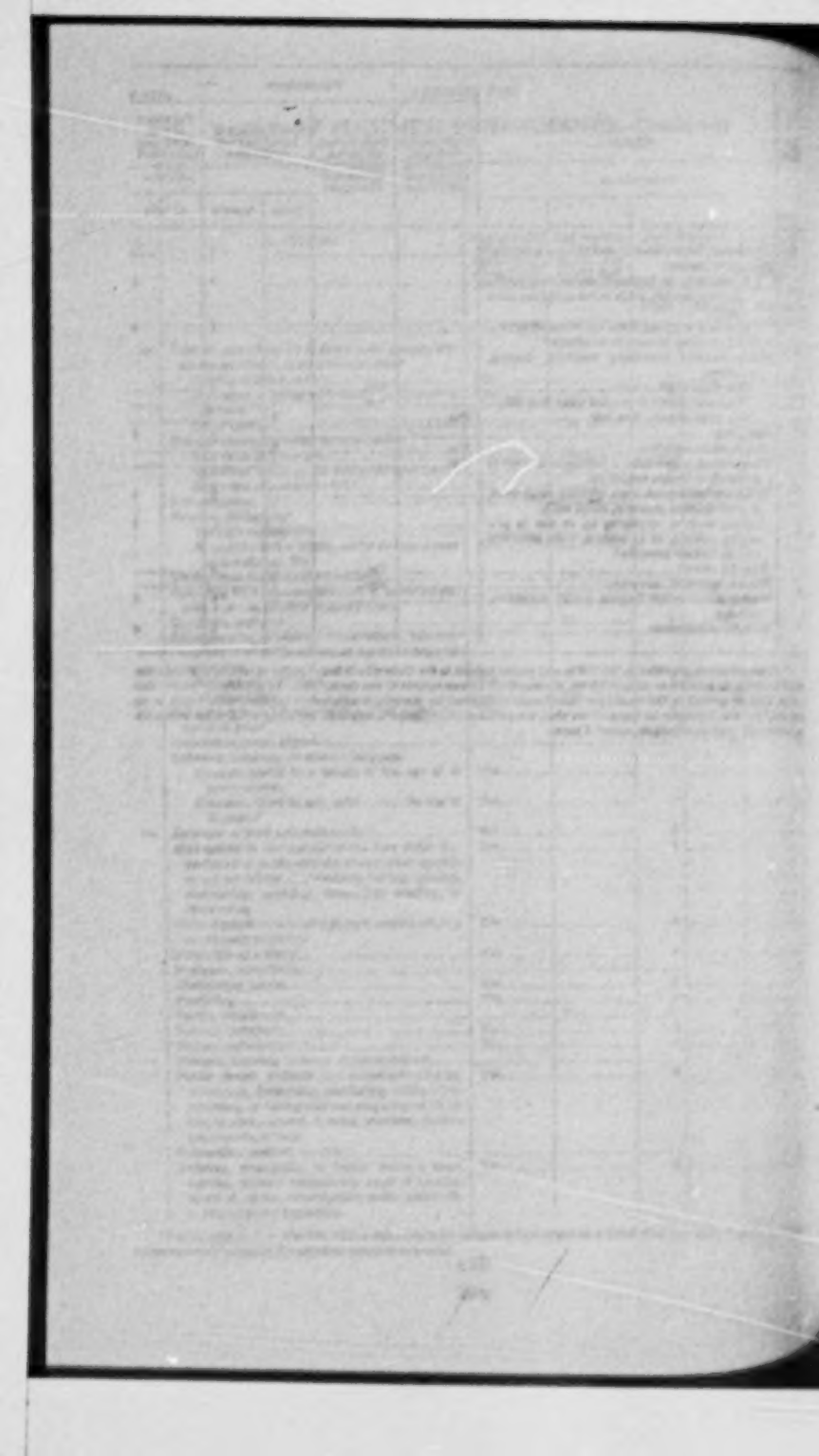

Supreme Court, U.S.
FILED
FEB 1 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

vs.

MARK AVRECH,

Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR APPELLEE

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In The

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October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

vs.

MARK AVRECH,

Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Is Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, which punishes "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces" unconstitutionally vague and overbroad on its face and as applied?

2. Is a court-martial charge of "promot[ing] disloyalty and disaffection" unconstitutionally vague and overbroad?

3. Does a serviceman stationed at an air base in Vietnam have a First Amendment right to express, during off-duty hours, statements of opposition to the war in Vietnam which do not call for any illegal action and are not of such a nature as to result in such action?

STATEMENT OF THE CASE

The Facts

Avrech enlisted in the Marine Corps in August, 1967 and was transferred to Vietnam in March, 1969. One evening in April, 1969 while stationed at his base in Danang, he typed a short statement on a stencil which criticized the contribution the South Vietnamese were making toward the war effort and the United States involvement in the war. The statement read as follows:

> "I've been in this country now for 40 days and I still don't know why I'm here. I've heard all the arguments about communist aggression and helping the poor defenseless people. I've also heard this three years ago. The entire Vietnamese Army will switch to a pacification role in 1967 and leave major fighting to the American Troops. (Statement of South Vietnamese Foreign Minister, L. A. Times, Nov. 18, 1966.) It seems to me that the South Vietnam people could do a little for the defense of their country. Why should we go out and fight their battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings? If South Vietnam was willing to go it on their own back in 1964 what the hell is the matter with them now? The United States has no business over here. This is a conflict between two different politically minded

groups. Not a direct attack on the United States. It's not worth killing American boys to have Vietnam have free elections. (Former Vice President Richard M. Nixon, L.A. Times, December 31, 1967.) That was our present leader of this country and now he has the chance to do something about the situation and what happens. We have peace talks with North Vietnam and the V.C. That's just fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars, I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relation at all to the cause of the conflict. Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U.S. withdrawal. We've been sitting ducks for too long. ***SAM"[1]

1. Avrech obtained the quotations of the South Vietnamese Foreign Minister and President Nixon, which he used in his statement, from a book entitled "Mission to Hanoi" which was in the PX at Danang (Tr. 32a). This book was available to all servicemen with the apparent sanction and approval of the military authorities. An examination of this book indicates that Avrech excerpted the mildest of comments from the book ignoring far more critical remarks contained therein. See, *e.g.*, comments of Brig. Gen. Robert L. Hughes USAR, "We are prosecuting an immoral war in support of a government that is a dictatorship by design. It represents nothing but a ruling clique and is composed of morally corrupt leaders who adhere to a warlord philosophy," (p. 351). Brig. Gen. William Ford, USA [Ret.] "We are pursuing a war that has no moral or political justification" (pp. 351-352); Gen. David M. Shoup, USCMC [Ret.] "I believe that if we had and would keep our dirty, bloody, dollar-crooked fingers out of the business of these nations so full of depressed, exploited people, they will arrive at a solution of their own" (p. 353).

Avrech then approached Corporal William Jackson, his immediate superior who was in charge of operating the mimeograph machine, and asked him to make copies of the stencil or permit him (Avrech) to do so. Corp. Jackson asked to see the stencil but Avrech refused to show it to him. Corp. Jackson then refused to let Avrech have access to the mimeograph machine (Tr. 25a).[2] Several minutes later Corp. Jackson noticed Avrech typing up the heading on the stencil. He approached him picked up the stencil from the table, and read it.[3] When Corp. Jackson told Avrech that he was going to retain the stencil, Avrech asked him not to allow other people to read it (Tr. 28a). The next day Corp. Jackson turned the stencil over to a superior officer.

Based upon the incident Avrech was charged with violating Article 134 of the Uniform Code of Military Justice (hereinafter "UCMJ"), 10 U.S.C. § 934, by publishing to members of the Armed Forces of the United States a statement "disloyal to the United States" "with design to promote disloyalty and disaffection among the troops" (App. 4-5).[4] Avrech was also charged under Article 80, 10 U.S.C. § 880, with an attempt to commit that offense (App. 3-4).

Avrech pleaded not guilty to both charges. At his court-martial Avrech testified that in drawing up the statement he only intended to put his views down on

2. "Tr." refers to the summarized record of the trial, reprinted in the Appendix to the briefs in the Court of Appeals.

3. Cpl. Jackson testified as follows:

> "He [Avrech] did not solicit my reading it [the stencil] . . . He said here it is if you want to read it. I took it and read it. In a sense I guess you could say that I took it from him" (Tr. 28a).

4. "App." refers to the Appendix filed with this Court.

paper and to distribute 8-10 copies to friends with whom he had previously discussed the war in private (Tr. 36a, 37a). He stated that he was not disloyal to the United States, that he did not consider his statement to be disloyal and that it was not his intent to be disloyal to the government of the United States (Tr. 34a, 39a).

Avrech also presented testimony from other servicemen with whom he had held discussions about the war. They testified that statements similar to those in the stencil had been made by Avrech previously and that such statements did not in any way affect their conduct or their attitude toward the Marine Corps or their duty (Tr. 48a, 51a). These servicemen, including Corp. Jackson further testified that Avrech had never advised any of them to desert or refuse to perform their work (Tr. 28a, 45a). The prosecution presented no evidence to the contrary. [5]

At the conclusion of the trial, Avrech was acquitted of publishing the statement but convicted of the attempt to publish. He was sentenced to a reduction in rank, forfeiture of three months pay and confinement at hard labor for one month. The convening authority suspended the confinement portion of the sentence. The Staff Judge Advocate and the Judge Advocate General of the Navy then approved the findings and the sentence. [6]

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5. The government states in its brief (6) that "a witness for the government, however, testified that Avrech had stated earlier that it [the statement] was disloyal." This witness was Captain Mockenhupt. The government's summary of his testimony is incomplete. Captain Mockenhupt who was appointed the investigating officer in the case testified that Avrech initially told him the statement was not disloyal in any respect but that after he (Capt. Mockenhupt) reiterated to Avrech that it was disloyal, Avrech finally acquiesced in this characterization of his statement (Tr. 52a). Avrech denied he ever acknowledged to Capt. Mockenhupt that the statement was disloyal (Tr. 55a).

6. The Judge Advocate General of the Navy was the highest authority within the military with jurisdiction to review appellee's conviction.

The Proceedings Below

Following his discharge from the Armed Forces,[7] Avrech brought suit in the District of Columbia, seeking a declaratory judgment that his court-martial conviction was invalid and an order requiring the Secretary of the Navy to expunge the conviction from his military records and to restore to him all pay and benefits lost by reason of his conviction. He alleged in his complaint that Article 134 was unconstitutional on its face and as applied and that his conduct was protected by the First Amendment.

The District Court granted the government's motion for summary judgment holding that Article 134 was not unconstitutionally vague and that Avrech's statement was not protected by the First Amendment (J.S. App. B, 27-28, J.S. App. C, 29-34). The Court of Appeals, in an unanimous opinion written by Mr. Justice Clark, reversed. The opinion briefly reviewed the history of Article 134 and noted its use by the military to encompass a wide range of unrelated offenses. It stated that

> "[b]oth clauses[8] have been expanded beyond recognition and now encompass the residue of offenses that have sprung up with what were thought to be the necessities of disciplining the ever-increasing population of the armed forces" (J.S. App. A, 18).

7.. On June 26, 1970 Avrech was discharged from the Marine Corps with a bad- conduct discharge after a second and unrelated court-martial conviction. The Navy Court of Military Review took into consideration Avrech's conviction for disloyalty in determining the type of discharge he was to be given.

8. "All disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."

The opinion concluded by holding that

> "Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities" (J.S. App. A, 20).

Rejecting the government's contention that civilian standards of specificity did not apply to the military (J.S. App. A, 23), the court below held that the Article was unconstitutionally vague.[9]

SUMMARY OF ARGUMENT

I

Neither of the first two clauses of Article 134 meet current constitutional standards for they do not provide fair warning to servicemen of the conduct proscribed by the Article nor do they set forth explicit standards to guide the enforcing authorities. This Court has frequently held statutes containing language similar to that in Article 134 to be unconstitutionally vague.

The history of the first clause of Article 134 ("all disorders and neglects to the prejudice of good order and discipline") demonstrates that it was intentionally drafted to be vague and undefined and was so recognized by numerous British and American military commentators. The second clause ("all conduct of a nature to bring discredit upon the armed forces") was added to the Article in 1916 for the single purpose of covering retired

9. The opinion of the court below did not discuss either of the other two issues presented to it, *i.e.*, the vagueness of the disloyalty specification and whether Avrech's statement was protected by the First Amendment.

noncommissioned servicemen. This clause has also been recognized to be vague and it has been expanded to cover a whole range of offenses committed by servicemen on active duty.

The military has used Article 134 as an open-ended statute to cover all conceivable offenses committed by servicemen. There is absolutely no common understanding or practice which underlies the miscellaneous offenses charged under the Article, and the military itself at times disagrees as to which offenses fall within the Article. The listing of offenses in the Manual for Courts Martial amounts to the exercise of a legislative function by the military. Moreover, the list does not provide fair warning to servicemen because (1) new and unrelated offenses are constantly being added to the list while other offenses are eliminated; (2) servicemen are prosecuted for acts not set forth in the list; and (3) the listing of an offense does not necessarily mean that a serviceman will violate Article 134 if he commits that offense.

The government contention that, despite the obvious invalidity of Article 134 on its face this Court should not reach that question, is not justified by precedent and would effectively overrule a long string of cases in this Court in which the validity of statutes were considered on their face.

II

Article 134 is capable of being construed, and has been construed, to cover the First Amendment area. Since the Article reaches constitutionally protected activity it is unconstitutionally overbroad. The government's argument that this Court should not declare the statute overbroad because it covers non-speech as well as speech activity conflicts with the rationale underlying this Court's

doctrine of overbreath. Further, the concessions made by the government require a holding that Article 134 is overbroad.

III

The word "disloyal", used in the court martial charge, is vague and overbroad and has been so recognized by the only federal court to deal explicitly with the issue. *Stolte v. Laird*, 353 F. Supp. 1292 (D.C.D.C. 1973). The Manual for Courts Martial does not define the words "disloyal statements" but merely gives examples of what constitutes such statements. These examples are themselves vague. The highest military court has defined the term "disloyalty" to mean "lack of allegiance to the United States" but this definition is itself vague. In any event, appellee's statement was merely an expression of opposition to this country's policy in Vietnam and did not amount to a "lack of allegiance to the United States."

IV

This Court has made abundantly clear that speech may be curtailed only under very narrow circumstances, and most recently has held that speech may be prohibited only where it is directed toward inciting and is likely to incite lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There is no reason why this test should not be applied in judging when speech by servicemen may be prohibited. Judged by this test appellee's statement was protected by the First Amendment. His statement did not mention or suggest a call to illegal action nor was it intended to incite disobedience, and no evidence to the contrary was introduced at his court-martial. Servicemen should be allowed to express their personal opinions on issues during

off-duty hours. They are already exposed to a vast array of views in the books and magazines which are readily available to them.

ARGUMENT

POINT I

ARTICLE 134 OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONALLY VAGUE.

Since 1921 this Court has consistently held that vague penal statutes are unconstitutional. See, *e.g.*, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. Harriss*, 347 U.S. 612 (1954); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), this Court summarized the principles underlying its numerous holdings that vague laws are unconstitutional when it stated:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with

> the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [these] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 108-109 (footnotes omitted).[10]

We shall show that Article 134 because of its language, its history, and its application by the military violates all three of these values.[11]

A. The Language of Article 134.

The present case involves the first two clauses of Article 134 which punish "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces."[12]

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10. The government in its brief consistently assumes that the only basis for this Court's holdings on vagueness lies in the first value, *i.e.*, that fair warning be provided to those subject to the law, and it analyzes Article 134 solely in those terms. As we show, *infra*, pp. 41-47, its analysis even on those limited terms does not meet constitutional standards. However, at no point in its brief does the government show any recognition of the second value, *i.e.*, that explicit standards must be provided to avoid arbitrary and discriminatory enforcement by those who apply the law.

11. The government argues (Br. 10-12) that the Court of Appeals improperly determined the question of the constitutionality of Article 134 on its face and that this Court should limit its inquiry to the constitutionality of the Article as applied to the peculiar facts of this case. We treat with this contention, *infra*, pp. 27-29.

12. The charge against the appellee here did not specify which of the first two clauses of Article 134 were allegedly violated. Thus if either one of these two clauses is unconstitutionally vague appellee's conviction must be overturned. *Bachellar v. Maryland*, 397 U.S. 564 (1970); *Stromberg v. California*, 283 U.S. 359 (1931).

There can be no question that in light of the decisions of this Court neither of these phrases, on their face, meets current constitutional standards.

This Court has invalidated statutes whose operative words were almost identical to those contained in the first clause of Article 134. In *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), this Court struck down a city ordinance which gave the City Commission power to refuse permits on the grounds *inter alia*, of "public welfare," "decency," "good order," "morale or convenience." This, the Court held,

> "... conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morale, or convenience.'" 394 U.S. at 150.

Other decisions of this Court have invalidated statutes employing standards such as "general welfare," *Staub v. City of Baxley*, 355 U.S. 313 (1958); "misconduct", *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); conduct that was "annoying", *Coates v. Cincinnati*, 402 U.S. 611 (1971); "reprehensible", [13] *Giaccio v. Pennsylvania, supra;* or "prejudicial to the best interests of a city", *Gelling v. Texas*,343 U.S. 960 (1952). Other federal courts have voided statutes whose operative words were "discipline", *Alexander v. Thompson*, 313 F.Supp. 1389 (C.D. Calif.

13. Military courts have used this word to describe conduct proscribed by Article 134. *United States v. Lee*, 4 CMR 185, 191 (ABR 1952), "reprehensible conduct"; see, *United States v. Rio Poon*, 26 CMR 830, 833 (CGBR 1958), "universally reprehended."

1970); "immorality", *Burton v. Cascade School District*, 353 F.Supp. 254 (D. Oregon 1973) or which penalized "offensive", *Pritkin v. Thurman*, 311 F.Supp. 1400 (S.D. Fla. 1970); "immoral", *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) or "demoralizing", *Oestreich v. Hale*, 321 F.Supp. 445 (E.D. Wis. 1970) conduct.

Equally undisputed is the vagueness of the language of the second clause, "all conduct of a nature to bring discredit on the armed forces." See Note, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 U.C.L.A. L.Rev. 821 (1971). As one military author has stated, "the words 'of a nature to bring discredit' mean no more than that the act is one customarily regarded as reprehensible." Hagan, *The General Article — Elemental Confusion*, 10 Mil. L. Rev. 63, 104 (1960). The vagueness of the word "discredit" was recognized in *Flynn v. Giarrusso*, 321 F.Supp. 1295 (E.D. La. 1971), which struck down, on its face, a regulation requiring a policeman to act in a manner which will not "reflect discredit upon himself or the Department." *Id.* at 1300. Significantly, the government here makes no effort to defend this clause against a charge of vagueness. Indeed a reading of its brief fails to reveal any recognition that this second clause is even present in Article 134.

There can be no argument that taken on its face the language of Article 134 is vague.[14] Both the government here (Br. 15) and the Court of Military Appeals in *United States v. Frantz*, 2 USCMA 161, 163, 7 CMR 37, 39 (1953), concede as much contending only that the Article has acquired a settled meaning as a result of custom and

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14. We deal elsewhere with the vagueness of the court-martial charge of "disloyal statements," *infra*, Point III.

practice, an argument with which we show below, *infra*, to be without merit. [15]

B. The History of Article 134. [16]

The history of these two clauses demonstrates tha they were purposely written to be vague, and wer uniformly recognized as such by military commentator The only apparent purpose of these clauses, as Mr. Justic Clark noted below, was "to act as a catchall for varie types of unforeseen misconduct not otherwise covered b the Code" (J.S. App. A, 20).

1. "Disorders and Neglect to the Prejudice of Goo Order and Discipline."

Article 134 has formed part of the American militar code since 1775, and its language, except for the additio in 1916 of the phrase "all conduct of a nature to brin discredit upon the armed forces" has remained virtuall

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15. The only commentator cited by the government for t validity of Article 134 is Weiner, *Are the General Military Articl Unconstitutionally Vague*, 54 A.B.A.J. 357 (1968). As Justice Cla specifically noted (J.S. App. A. 21), Weiner recognized that th language of the Article was "unduly indefinite." Weiner's thesis w that despite this the Article could pass constitutional muster becau it acquired a settled meaning. As we show below, there is nothing i the history and application of the Article to support this contentio

16. The government's version of the history of Article 134 (B 13-14) is a once over lightly listing of dates without any discussio or consideration of the purpose of the Article and the manner i which it was employed by the military. The government refers (B 14, fn. 8) to Weiner as a source for the legislative history of th Article. However, Weiner merely sets out the date when Article 1 was first adopted and the dates of its subsequent revisions. He sho no recognition of the historical material set out herein and even h knowledge of the narrow legislative history is faulty. See, *infra*, 22.

unchanged since that time.[17] The Article was modeled upon the British Articles of War[18] which date back at least to 1688.[19]

British military writers uniformly recognized that the Article was vague and undefined.[20] One of the earliest military commentators who wrote a treatise on military

17. When the Continental Congress first enacted the Articles of War in 1775, this Article was Article 50. In the revision of 1776, it became Section 18, Art. 5. It was retained virtually unchanged in the revisions of 1806, 1874, 1916 (except for the addition of the second clause) and 1920. The texts of these articles can be found in Winthrop, *Military Law and Precedents* (2nd Ed. 1920).

18. John Adams, *Life and Autobiography*, Vol. III, pp. 68-69. John Adams was chairman of the Committee of Congress charged with drafting the Articles of War of 1776.

19. The British equivalent of Article 134 dates back, at least, to Article 64 of the Articles of War of King James II of England. Section 20, Art. 3 of the British Articles of War of 1765, which were in force at the beginning of the American Revolution punished "all crimes not capital and all disorders and/or neglects officers and soldiers may be guilty of to the prejudice of good order and military discipline."

20. The available evidence indicates that at one point in history the words "disorders" and "neglect" had a more precise meaning than they have today. William Hough, the noted British military commentator, in his work *The Practice of Courts-Martial* (1825), although he did not define "disorders" did characterize them as acts that "more usually take place under circumstances unconnected with duty and are esteemed disorderly or insubordinate conduct." *Id.* at 634. He listed as examples habitual insubordinate language and conduct at the mess, drunkenness, and abusing and striking a soldier on duty. *Id.* at 642. "Neglect" was defined as "neglecting to observe standing orders and regns, or those orders which are issued and intended to be carried into immediate execution or shortly after." *Id.* at 633. As examples of acts falling under this category, Hough listed keeping the books in a negligent manner, not reporting infectious diseases to a commanding office and allowing goods to be stolen. *Id.* at 641-642.

(Cont'd)

law acknowledged that the Article granted to courts martial

> "Almost an unbounded jurisdiction . . . to declare what shall amount to the crimes in contemplation, and what the quantum of punishment assignable to them; governed not in anything but by its own discretion." E. Samuels, *An Historical Account of The British Army and the Law Military* (1816), p. 686.

Major General Vans Kennedy, cited in *A Treatise on the Principle and Practice of Military Law* (1847), acknowledged that "it will be obvious that there is scarcely any impropriety of conduct or irregularity which an officer or soldier may commit, that is not brought under" this Article, *Id.* Act 34, while Colonel James Pipon, in his *Manual of Military Law* (3rd Ed. 1863) stated that "the wide terms in which this Article is couched make it capable of its being construed to include every crime or offense of which a soldier may be guilty." *Id.* at 89. Major General Charles Napier argued that the lack of precision and failure to clearly define crimes in the Articles of War was a virtue which should be preserved, and that Article 134 was "the most useful" of all the Articles in this respect. *Remarks on Military Law* (1837), p. 59. Indeed the very vagueness of the Article caused it to be popularly known as the "Devil's Article." Charles Clode, *Administration of Justice Under Military and Martial Law* (1874), p. 12. [21]

We have found no evidence to indicate at what point the meaning of these words was expanded to cover offenses, such as the present, which on their face do not fall within the category of either a "disorder" or a "neglect".

21. Today the Article is known by its equivalent as "Catch-22," Note, *Taps for the Real Catch-22*, 81 Yale L.J. 1518 (1972).

American military writers agreed with their British counterparts respecting the vagueness of this Article. In his *Treatise on Military Law* (1846), Lieutenant John O'Brien referred to the General Article in the following terms:

> "The power confided to military courts is certainly very large, and not limited with great precision . . . .The general misbehaviors and neglects contemplated by the article are too numerous to be reckoned, and of too mixed, unsettled, and changeable a character to be in all instances delineated. From the very necessity of the case they must, in many instances, remain undefined." *Id.* at 164.

A later military commentator agreed, noting that the Article "is an apparent exception to the rule that offenses against the United States must be exactly described in the statutes creating them." Davis, *A Treatise on the Military Law of the United States* (1915), p. 473.

2. "All Conduct of a Nature to Bring Discredit Upon the Armed Forces."

Unlike the first clause of Article 134, this second clause is of relatively recent vintage. It was initially added to the General Article in 1916 because of the view that neither the first clause of Article 134 nor the precedessor of Article 133, 10 U.S.C. § 933, covered retired noncommissioned servicemen and the military believed it necessary to have a catch-all provision to cover offenses committed by such servicemen. The then Judge Advocate General of the Army, General Enoch Crowder stated as follows with respect to this clause: [22]

22. Weiner erroneously states in his Article (54 A.B.A.J. at 358, fn. 7) that General Crowder never set forth the reasons for the enactment of this clause.

> "That was inserted for a *single purpose*. We have great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his official position we can try him . . . for 'conduct unbecoming an officer and a gentlemen.' We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to the good order and military discipline; because the act of a man on the retired list, away from any military post, cannot be reasonably said to affect military discipline. I threw in that language to cover the cases of these men. . . . Only the small class of men that I have spoken of [retired non-commissioned servicemen] could be tried under it [the second clause], for the soldier on the active list is covered by other articles." (Emphasis added.) *Hearings Before the Subcommittee of the House Committee on Military Affairs on H.R. 23628*, 62nd Cong. 2nd Sess. (1912), pp. 83-84. [23]

In the ensuing colloquy with Representatives Hughes and Kahn, General Crowder acknowledged that the scope of the clause was broad.

> "Mr. Hughes: This language 'all conduct of a nature to bring discredit upon the military service' seems to include everything?
>
> Gen. Crowder: It was inserted for that purpose

23. Hearings on the revisions of the Articles of War were held beginning in 1912 and this clause was first proposed at that time. The clause was contained in subsequent proposals which were the subject of additional hearings in 1916. The actual revision of the General Article was adopted in 1916 as part of a revision of the Articles of War.

Mr. Kahn: It is like the catch-net language of the tariff bills.

Gen. Crowder: Yes. It is not of the greatest importance, but it would relieve the service of considerable embarrassment to have that language retained."

Despite the purpose for which it was originally enacted this clause has been expanded to cover offenses committed by servicemen on active duty,[24] and the scope of the offenses covered, both for retired servicemen and those on active duty, are seemingly limitless. The inherent vagueness of this clause and its expanded meaning were acknowledged in the Legal and Legislative Basis of the Manual for Courts-Martial (1951)[25] which noted:

"By judicial interpretation these 'vague words' have since been expanded from the narrow

24. The expansion of the original scope of this clause by the various Manuals for Courts-Martial can be easily traced. The Judge Advocate General's "single purpose" of the clause [to cover retired noncommissioned servicemen] became the "principal object" (1917 Manual, Par. 446), which became "another principal object" (1921 Manual, Par. 446), and finally turned into "one object" (1928 Manual, Par. 1526). See, generally, Hagan, *The General Article — Elemental Confusion*, 10 Mil. L. Rev. 63, 75-76 (1960).

25. The preface to the Legal and Legislative Basis for the Manual for Courts- Martial (1951) states:

"This pamphlet contains a short history of the preparation of the Manual for Courts-Martial, United States, 1951, together with brief discussions of the legal and legislative considerations involved in the drafting of the book. With minor exceptions, the discussions of the various subjects were written by the officers who prepared the initial drafts of the comparable portions of the manual."

> construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions for practically any offense committed by one in the military service which is not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice of good order and discipline." *Id.* at 295.

The same document describes the phrase "conduct of a nature to bring discredit upon the armed forces" as the "catch-all" in military law. *Id.* at 294.

The broad reach of Article 134 and the unlimited discretion it gives to the military has been recognized by legislators and military officers. For example, the exchange between Senator Chamberlain and Major J. E. Runcie during the hearings in 1919 on the revision of the Articles of War is illuminating:

> "Senator Chamberlain: . . . As I read that Article [the predecessor of Article 134] there is not a thing under the sun that has anything to do with the military establishment that can not be denounced as a military offense and punishable by a commanding officer.
>
> Major Runcie: By a court, and with the approval of the commanding officer.
>
> Senator Chamberlain: In the last analysis it is the same thing.
>
> Major Runcie: Yes, it is. That article will cover any statement of facts which the authority which convenes the court chooses to regard as a military offense, although legally there is not one element

of a military offense in it." *Hearings on S.64 Before the Subcommittee of the Senate Committee on Military Affairs*, 66 Cong. 1st Sess. (1919) p. 36. [26]

Colonel Edmund Morgan, who later became Chairman of the Committee which drafted the Uniform Code of Military Justice, expressed the same sentiments when he stated:

> "And the usual uncertainty of the specific punitive articles is made more uncertain by the so-called general article, which denounces 'all disorders and neglects to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service.' What constitutes such disorder, neglect, or misconduct depends upon the commanding officer, the court, or the reviewing authority as the case may be. What one officer may consider an offense, another may entirely overlook. What a particular officer may deem a violation of this article if done on Monday, he may regard as immaterial if committed on Tuesday. There is no legal test and no legal method of enforcing any alleged or supposed test." Address by Col. Edmund Morgan before the Maryland State Bar Assn., June 26, 1919, placed into the record at the end of his testimony at the *Hearings on S. 64, supra* at 1389.

During the hearings which led to the adoption of the UCMJ in 1950, the same view of Article 134 was expressed by Felix Larkin, Asst. Gen. Counsel in the Office of the Secretary of Defense and Executive Secretary of the Committee which drafted the Code:

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26. See also the testimony of Brigadier General Samuel Ansell at the same hearings. *Id.* at 268.

> "Mr. Larkin: . . . To accuse a man of violating Article 96 [now Article 134] does not necessarily tell him very much because it is an article which makes conduct to the prejudice of good order and discipline and things of that character an offense.
>
> Mr. Books: It is a catch-all, is it not?
>
> Mr. Larkin: That is right. So while the other punitive articles set out specific offenses of robbery, burglary, and so forth, that one does not. Of course, when the man is served with formal charges and specifications he is told what act he is alleged to have committed." *Hearings Before a Subcomm. of the House Committee on Armed Services*, 81st Cong. 1st Sess. (1949), p. 912. [27]

More recently the Chief Judge of the United States Army Court of Military Review acknowledged that the vagueness of Article 134 was so clear that "it probably could not withstand a 'vague and indefinite' attack in the Supreme Court." Major General Hodson, *Perspective, The Manual for Courts-Martial 1984*, 57 Mil. L. Rev. 1, 12 (1972). Other commentators have echoed the same view. See, for example, Note, *Taps for the Real Catch-22, supra*; Graynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hasting L.J. 259 (1971); Note, *The Discredit Clause of the UCMJ: An Unrestricted Anachronism*, 18 UCLA L. Rev. 821 (1971); Hagan, *The General Article–Elemental Confusion, supra*; Everett, *Article 134, UCMJ - A Study in Vagueness*, 37 North Carolina L. Rev. 142 (1959).

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27. During the same colloquy, Senator Smart stated that "conduct to the prejudice of good order" was a "shotgun statement" which "certainly is not telling him [the serviceman] much." *Ibid.*

C. The Use of Article 134 by the Military.

The application and construction of Article 134 since the adoption of the Uniform Code of Military Justice has demonstrated that the military has continued to regard this Article as open-ended and available to cover any conceivable offense committed by servicemen. As Mr. Justice Clark so aptly noted below, the Manual lists a "crazy quilt of offenses" (J.S. App. A, 19) ranging from abusing a public animal to wrongful cohabitation and including such miscellaneous offenses as criminal libel, dishonorably failing to pay a debt and pandering. [28]

It is clear that the enumeration of miscellaneous offenses in the Manual is neither all-inclusive nor definitive. The former is demonstrated by the fact that the military has used Article 134 to charge servicemen with a wide range of acts not listed in the Manual and which have no common characteristics. [29] Thus the Legal and Legislative Basis for the Manual states that whether or not a particular offense is listed in the Manual

> "is not what makes an act an offense . . . There are necessarily many other acts which may constitute

28. The 1969 Manual lists over sixty sample specifications of offenses which allegedly are covered by Article 134.

29. Even before the adoption of the UCMJ servicemen were charged with a wide range of miscellaneous offenses. Acts which were charged under Article 134 included failing to register at a hotel and refusing to have one's teeth fixed. Karen, *The Personal Factor in Military Justice*, 1946 Wisc. L.Rev. 394, 402. The author, a former officer in the Judge Advocate General Dept. of the Army's Infantry Div., stated that Articles 133 and 134 were "wide and elastic enough to include almost any meaning which the men interpreting them desire." *Id.* at 398.

> disorders or neglect, or conduct discreditable to the armed forces which are not discussed or covered by any sample specification." *Id.* at 296.

Thus Article 134 has been held to penalize bestial acts with a chicken, *United States v. Sanchez*, 11 USCMA 216, 29 CMR 32 (1960); window peeping in a trailer park, *United States v. Clark*, 22 CMR 888 (AFBR 1956), *pet. denied*, 22 CMR 331 (1956); cheating while calling bingo numbers, *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957) and an officer's drinking with an enlisted man, *United States v. Livingston*, 8 CMR 206 (ABR 1952), *pet. denied*, 8 CMR 178 (1953).[30] In one opinion the Court of Military Appeals has indicated that it was necessary to keep Article 134 open-ended so as to match the ingenuity of servicemen who apparently may commit new offenses which the military authorities never thought of punishing. Thus in holding that placing objects in the duct of a jet aircraft violated Article 134, the court stated:

> "Since jet engines have been installed in United States aircraft only since World War II, what the appellant did in this instance has no prolonged history as a military offense. As military doctrine and weapons change, however, some new military offenses necessarily develop." *United States v. Martinson*, 21 USCMA 109, 44 CMR 163, 164 (1971).

Moreover, each successive edition of the Manual contains a different list of offenses which allegedly constitute violations of Article 134. New offenses, not previously listed, are added while other offenses,

30. Attached hereto as Appendix A is a sample list of acts with which servicemen have been charged since 1951 under the first two clauses of Article 134 even though those acts were not listed in the Manual as offenses at the time they were committed.

previously set forth, are eliminated. Aside from the listing itself, nowhere does there appear any rationale, explanation or statement as to why some offenses are added and others are eliminated. So far as one can tell from any published material the decision to add or drop offenses is taken somewhere in the deep recesses of the Pentagon.

A good example of the use of Article 134 to cover offenses according to what appears to be the whim and caprice of the Pentagon is the specific charge of disloyalty brought against the appellee in the instant case. The making of a "disloyal" statement was not listed in the 1895, [31] 1898, 1901, 1908, 1917, 1921, 1928 or 1943 Manuals for Courts-Martial as coming within the coverage of Article 134. The legislative history relating to the adoption of the Uniform Code of Military Justice contains no reference to "disloyal statements" as coming within Article 134. The first reference to "disloyal statements" as being an offense under Article 134 appears in the 1951 Manual. There is no explanation of the source or origin for this entry. The Legal and Legislative Basis of the Manual for Courts-Martial, in commenting on the Table of Maximum Punishment of the 1951 Manual, simply states that "uttering disloyal statements undermining discipline and loyalty is a *new* entry." *Id.* at 201 (emphasis added). [32]

The 1969 Manual continued the usual practice of haphazardly adding and eliminating offenses. Thus, criminal libel, obstructing justice and wrongful cohabitation were added while others, such as lending money at usurious interest, were eliminated.

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31. This, we believe, was the earliest Manual.

32. At the same time a new entry "concerning bribes and grafts" was added. Legal and Legislative Basis at 201. The same document notes that "The entry in the 1949 Manual 'Allowing a prisoner to

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Further, some offenses have been held to fall within the ambit of Article 134 under the theory of analogizing them to other offenses. See, *e.g.*, *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953). The practice of analogizing offenses, as Mr. Justice Clark observed below (J.S. App. A., 21), was condemned by this Court in *Papachristou v. City of Jacksonville*, *supra* at 168-169. See generally Everett, *Article 134 UCMJ - A Study in Vagueness*, *supra*.

In addition, servicemen have been convicted of violating Article 134 even when their acts were originally charged under another Article of the Code, and the proof failed to sustain the original charge. Thus, for example, in *United States v. Williams*, 4 CMR 801 (AFBR 1952) the court held that a serviceman charged with larceny in violation of Article 121, 10 U.S.C. § 921 could be convicted under Article 134 for "wrongful taking" when the requisite intent for larceny was absent. *Id.* at 807. In another case, a serviceman, charged with malingering under Article 115, 10 U.S.C § 915, was convicted under Article 134 for having intentionally injured himself by cutting his arm with a razor blade, *United States v. Taylor*, 17 USCMA 595, 38 CMR 393 (1968). [33]

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receive or obtain intoxicating liquor' has been deleted, but a more comprehensive entry has been substituted, 'Prisoner, allowing to do an unauthorized act.' " *Ibid.*

33. In *United States v. Davis*, 27 CMR 908 (CGBR 1958) a serviceman was charged with destroying military property in violation of Article 108, 10 U.S.C. Section 908, but convicted under Article 134 for having removed fuses from a fuse box without authority. The Court reversed the conviction because the act of removing fuses from a fuse box was neither listed in the Table of Maximum Punishments nor in the Manual's model specifications. Apparently sometimes the failure to list acts in the Manual excludes those acts from the coverage of Article 134 and sometimes it does not.

D. The Government's Contentions

1. Article 134 Should Not Be Judged On Its Face.

We have established that Article 134 is unconstitutionally vague because of its language, its history, and its use by the military and that this vagueness was intentional and deliberate. Justice Clark, writing for the court below, found to the same effect. The government here contends (Br. 11, 20-23) that the court below should not have, and this Court should not, address themselves to the issue of the validity of Article 134 if it can be established that Avrech "was, or should have been aware" that his conduct "was a kind of action that Article 134 clearly prohibits." (Br. 11) [34]

The principal authority relied on by the government for this contention is *United States v. National Dairy Corp.*, 372 U.S. 29 (1963). The author of the opinion in *National Dairy* was Mr. Justice Clark who wrote the opinion below, and although that case was cited to him by the government, he did not consider that it had any application to the instant case. It is easy to see why. In *National Dairy*, this Court was confronted with a statute whose history indicated that Congress clearly intended the particular act involved (selling below cost) to be included within the statute's coverage. The government here points to no history showing that Avrech's conduct was intended to be covered by Article 134. On the contrary, since Article 134 is so vague and broad that it can cover any conduct that the military does not like, it is an example of a "blunderbuss" statute which Justice Clark in *National*

34. The military tribunals made no finding that Avrech was aware his activity was illegal. Moreover, as we show below, *infra*, pp. 58-59 government counsel's expressed "belief" (Br. 11) for such awareness rests on questionable assumptions.

Dairy stated would be invalid on its face without regard to the specific conduct charged as an offense under the statute. Justice Clark stated "This is not to say that a bead-sight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage. *Id.* at 33. [35]

The other case chiefly relied upon by the government (Br. 22), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), lends even less support to its contentions. In the first place that case did not involve a penal statute. Secondly, the statute there explicitly condemned the conduct engaged in by the parties who were complaining of the statute's validity. Their contention was solely that other sections of the statute not applicable to their conduct could be construed to cover protected political expression. This Court held that it would not entertain the challenge to these other sections. The Court made the same holding in *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), also relied upon by the government (Br. 21-22). Here, on the contrary, Avrech is not complaining of the validity of portions of Article 134 which were not applied to him. He is contending that the specific phrases which served as a basis for punishing his conduct (*i.e.*, all disorders and neglects to the prejudice of good order and discipline and all conduct of a nature to bring discredit upon the armed forces) are invalid. Thirdly, in *Broadrick* this Court expressly sustained the statute because it found that Congress had made a "considered legislative judgment" that the conduct in question was to be proscribed. 413 U.S. at 611-612. It made the same finding with respect to the conduct involved in *National Dairy*, *supra*. However, as

35. *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971).

we have shown, Congress never made any judgment that Article 134 should cover Avrech's conduct. [36]

Finally the government's argument that this Court should consider only the narrow question of whether particular conduct is covered by the statute would in effect nullify this Court's repeated holdings that particular statutes are invalid on their face. See, *supra*, p. 10. Under the government's theory, it would never be appropriate for this Court to consider whether a statute was constitutionally invalid on its face because the Court would never have an opportunity to reach that question. The Court would only have an opportunity to determine if particular conduct was or was not within the coverage of the statute.

2. Article 134 Is Not Uncomstitutionally Vague.

The government advances several contentions, not all of them consistent with each other, to support its view that Article 134 is not unconstitutionally vague. As far as we can understand, these contentions are as follows:

a. The military is a specialized society with a historical tradition and function different from that of civilian society and its need for discipline requires that standards for defining crimes be different from those for civilian society (Govt. Br. 12-18).

b. Article 134 has acquired meaning from and embodies the "well-settled customs and practices" of the military community (Govt. Br. 13-17, 24, 27).

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36. The two other cases cited by the government (Br. 22-23) lend no support to its position. In *United States v. Petrillo*, 332 U.S. 1 (1947) and *United States v. Wurzbach*, 280 U.S. 396 (1930) this Court did reach the issue of the validity of the statutes on their face and sustained them.

c. The listing of offenses in the Manual serves the pragmatic purpose of providing fair warning (Govt. Br. 28-32).

d. Article 134 is limited by the requirement that:

(i) The conduct to be punished must be "directly and palpably" prejudicial to good order and discipline (Govt. Br. 27-28);

(ii) Intent (*mens rea*) must be shown (Govt. Br. 33-34).

None of these arguments has any validity and we shall deal with them seriatim.

a. The military is a specialized community whose need for discipline requires different standards than those applicable to civilian society.

The government states that the military is a "specialized society" with a "history, tradition and function" different from civilian society. It suggests (Br. 17) that the military's status as a "specialized society" automatically means that, at least with respect to constitutional matters, it is governed by different standards than those of civilian society. This argument is without merit.

First, none of the cases cited by the government (Br. 12-13) have anything to do with the question of the applicability of constitutional principles to the military.[37] Further, the concept that the military is a specialized

37. Indeed, if anything, these cases support the idea that this Court will apply normal principles of civilian law in dealing with many military matters. Thus in *In re Grimley*, 137 U.S. 147 (1890) this Court applied ordinary contract principles in upholding a

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community, if ever valid, has lost much of its force in light of present day realities. As Professor Bishop stated in *Collateral Review of Courts Martial*, 61 Columbia L. Rev. 40, 70-71 (1961):

> "[T]he main reason . . . that . . . courts should draw as little distinction as possible between . . . soldiers and other citizens is simply that, if there ever was a time when the Army could rationally be described as a 'separate community' with a separate system of government, that time is long past.[38] Most male citizens of the United States (and a fair number of the female ones) have a relation to the armed forces as direct and personal as that of a citizen of Pericles Athens or the Roman Republic in the days of Cato and Censor. My objection to the 'separate community' idea is not simply that it does not square with the

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soldier's enlistment contract, while in *Orloff v. Willoughby*, 345 U.S. 83 (1953) it held that the Army was obligated to give a servicemen duties for which it had specifically inducted him. In *Toth v. Quarles*, 350 U.S. 11 (1955) the Court held that neither Congress nor the President had authority to provide for a trial of an ex-serviceman by court-martial. *Burns v. Wilson*, 346 U.S. 137 (1953) recognized that the military must give full and fair consideration to constitutional questions raised by servicemen.

38. In his article *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181 (1962), Chief Justice Warren pointed out that at the time of Washington's inauguration, our authorized army strength was 840, whereas our armed services now numbered over 2 million. *Id.* at 187. Obviously, in the light of so vast a change in the military establishment, it is necessary to change our concepts of the right of servicemen. Moreover, Chief Justice Warren observed that with the military affecting such a large number of persons "the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question." *Id.* at 188.

> facts. On the basis of the experience of many nations in many times, I believe that concept to be actually pernicious, as is any way of thinking which tends to make the armed services an enclave of the national policy whose inhabitants are of other caste than the rest."

The military itself has stated that it "is not a monolithic establishment separate and apart from the American stream, with concepts and practices opposed to our country's carefully built and carefully preserved traditions of justice and decency and freedom." Statement of Alfred Fitt, Under Secretary of the Army (Manpower) at the *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary* 87th Cong. 2nd Sess. 63 (1962).

The military has to a large extent become civilianized. Vast numbers of servicemen perform technical jobs, many live off-base and commute to work. See Sherman, *Military Justice Without Military Control*, 82 Yale L.J. 1398, 1401-1403 (1973). Millions of civilians work for the military establishment and the contacts between the civilian and military communities are so numerous that "it can be said that military life is an immediate and integral part of American life." Chief Judge Quinn, United States Court of Military Appeals, *The Uniform Code of Military Justice — Its Promise and Performance*, 35 St. John's L.Rev. 225, 254 (1961).

President Nixon himself has emphasized that a soldier is a citizen first and a soldier second.[39] The concept that

39. The President's exact language was the following: "I believe that every man in uniform is a citizen first and a serviceman second and we must resist any attempt to isolate or separate the defenders from the defended." *New York Times*, June 5, 1969, p. 30:7.

soldiers remain citizens first and that an army serves to bring civilian views into the military has also been recognized both by commentators [40] and legislators [41] alike.

Even assuming that the military is to some extent a separate community, it does not follow, as the government suggests, that this community is automatically exempt from the Constitution. Indeed such a position has been rejected by military courts, *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960); *United States v. Tempia*, 16 USCMA 629, 37 CMR 249 (1967) [42] and civilian courts,. see, *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. den.*, 396 U.S. 1013, *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), *cert. den.*, 401 U.S. 982.

Of course, as the courts said in *United States v. Jacoby*, 29 CMR at 246-247 and *Kauffman v. Secretary of the Air Force, supra* at 997, it is conceivable that in a particular case application of a particular constitutional principle to the military may be inappropriate in light of "conditions peculiar to military life." *Ibid.* But this calls for a specific analysis of the particular practice involved in

40. Marmion, *Selective Service: Conflict and Compromise*, pp. 65-69 (the fact that our soldiers are "citizens soldiers guarantees that the military will not become isolated from ordinary American society)." See Swanson, *Ministry to the Armed Forces*, p. 40; Mitrisin, *The Pros and Cons of a Voluntary Army*, Current History, August, 1968; Marmion, *The Danger of a Voluntary Army*, 42 Forensic Quarterly 489 (1968).

41. See, *e.g.*, Senator Russell, 113 Cong. Rec. 12471 (1967)

42. "The time is long since past — as, indeed the United States recognizes — when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights." 37 CMR at 253.

light of the particular constitutional principle sought to be applied and not a blanket exemption for the military from the application of constitutional principles generally.

In the instant case the government claims that the military's need for "discipline and order" dictate different standards for the military (Govt. Br. 17) and that hence statutes, such as Article 134, should not have to meet the requirements of a criminal code (Govt. Br. 34).

The government's incantation of the phrase "discipline and order" (Govt. Br. 17) however should not — indeed cannot — serve as an automatic justification permitting the military to ignore applicable constitutional principles. This Court has on many occasions refused to accept the invocation of pat conclusionary phrases put forth to justify constitutional practices. As Chief Judge Burger stated in a related situation:

> "In recent years, the Court, in a rather casual way, has articulated the code phrase 'suspect classification' as though it embraced a reasoned constitutional concept. Admittedly, it simplifies judicial work as do 'per se' rules, but it tends to stop analysis while appearing to suggest an analytical process." *In re Griffins*, 413 U.S. 717, 730 (1973) (dissenting opinion).

Accord, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). This Court has consistently reserved for itself the task of examining code phrases such as "discipline," *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955); "national defense," *United States v. Robel*, 389 U.S. 258 (1967) and "administrative convenience", *Frontiero v. Richardson*, *supra* at 690 in order to determine if there is a sufficient underlying rationale to justify the abrogation of

constitutional principles and when such underlying rationale has not withstood judicial scrutiny the statute in question has been voided. See *Toth*, *Robel*, *Frontiero*, *supra*, *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), *cert. den.*, 409 U.S. 1076, *O'Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1 73).

At no point in its brief does the government set forth the reasons why "discipline and order" and the "particular customs reflected in traditional military conduct" (Govt. Br. 17) require that the standards by which civilian statutes are judged should not be applied to the military. Servicemen are normally accorded the protections of the Constitution and indeed military spokesmen have boasted that the guarantees of military due process are in advance of those prevailing in civilian courts.[43] The government here, however, argues (Br. 34) that specificity should not be required of Article 134 "lest the standard of the Army shall come down to the requirements of a criminal code." But that is precisely what the UCMJ is. See, *e.g.*, the comments of Senator Ervin and Brig. General Hodson[44] who acknowledged that the UCMJ established the equivalent of a set of criminal laws for the military. *Joint Hearings Before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong. 2nd Sess. 380 (1966).[45] *Cf. Giaccio v. Pennsylvania*, *supra* at 402.

43. See Sherman, *The Civilization of Military Law*, 22 Me.L. Rev. 3, 64-65 (1970).

44. At that time General Hodson was Assistant Judge Advocate General for Military Justice, Department of the Army and was speaking as the representative of the Department of Defense.

45. The UCMJ contains a whole series of penal statutes covering crimes by servicemen ranging from being absent without leave to murder. Upon conviction a serviceman may be sent to jail for periods up to life imprisonment. He may also receive a dishonorable discharge.

Moreover, as Mr. Justice Clark noted below in rejecting the government's contention that civilian standards of specificity do not apply to the military, the Court of Military Appeals in *United States v. Frantz*, 2 USMCA 161, 7 CMR 37 (1953) assumed that civilian standards of vagueness applied to the military. Similar holdings have been made by the Air Force Board of Review in *United States v. Britt*, 37 CMR 924 (AFBR 1967) and *United States v. McLeod*, 18 CMR 814 (AFBR 1954) and the Coast Guard Board of Review in *United States v. Barker*, 26 CMR 838 (CGBR 1958).

The modern military is basically an army composed of civilians. Civilians, such as appellee here, have left their normal civilian lives to serve their country for a period of at least two years and in some cases for far longer. In view of their actions and, at times their sacrifices, they certainly should be accorded the same treatment as any of their civilian counterparts who might be charged with a crime. To accord them a watered down version of constitutional guarantees, such as eliminating the guarantee that penal statutes be narrowly drawn, would demean their very act of serving in defense of their country.

The government in its brief (Br. 34) adopts with approval the argument advanced by Weiner (54 A.B.A.J. at 363) with respect to the military's need for a vague and undefined General Article:

> "[H]ow could Congress possibly legislate in minute detail what are 'disorders and neglects to the prejudice of good order and discipline,' or specify with particularity 'all conduct of a nature to bring discredit upon the armed forces'? Inevitably, new disorders and new misconduct not falling within the legislative enumeration but clearly comprehended under the existing

phraseology would occur to the ingenuity of those who are subject to military law." [46]

No doubt it may be convenient for the military to have a flexible and open-ended statute which it may use at its discretion to punish as crimes acts which are nowhere defined as such.[47] Police, mayors and indeed all enforcing authorities have traditionally argued for the same power. But the very argument is the reason why this Court has consistently declared such laws unconstitutional. Such a law "impermissibly delegates basic policy matters" to the military "for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford, supra* at 108-109. It is for this reason that this Court has consistently held that new and different offenses can be punished only pursuant to a new Congressional statute. *United States v. Maze*, ___U.S.___, 42 U.S.L. Week 4113 (Jan. 8, 1974). Aside from the argument of convenience the government gives no justification why this salutary rule should not apply to the military.

Further, even the government argument of convenience[48] is contradicted by various high-ranking

46. Weiner offers no documentation for his view that servicemen are more ingenious than civilians in inventing new crimes.

47. Military men express the view that it would be far more beneficial to the general morale and discipline of the military if the servicemen felt that the system of military justice was fair and equitable. Report to General Westmoreland, Chief of Staff, by the Committee for Evaluation of the Effectiveness of the Administration of Military Justice, p. 43 (Dept. of the Army, 1971) (members of Committee were all high ranking military officials); Hodson, *supra*, 57 Mil.L.Rev. at 16.

48. "Convenience" is a far cry from "military necessity" which, according to *Kauffman v. Secretary of the Air Force,, supra*, could in certain limited circumstances justify a departure from civilian standards.

military officials, including recent Judge Advocate Generals who have expressed the view that the military can function quite well without the broad power granted by Article 134. For example, Major General Kenneth Hodson, Chief Judge of the United States Army Court of Military Review, has stated: "I would abolish Article 134 . . . . We would thus rid ourselves of 'the Devil's Article'. We don't really need it, and we can't defend our use of it in this modern world." Hodson, *supra*, 57 Mil.L.Rev. at 12. More recently the Task Force on the Administration of Military Justice in the Armed Forces [49] whose 14 members included the Judge Advocate Generals of the Air Force, Army and Navy and the Director of the Judge Advocate Division of the Marine Corps recommended that Article 134 be abolished.[50]

b. There is a common understanding and practice as to which offenses are covered by Article 134.

The government argues that the "generalized language" of Article 134 has gained meaning from and embodies the

49. This Task Force was commissioned by the Secretary of Defense on April 5, 1972. The various Judge Advocate Generals disagreed with portions of the Task Forces' recommendations but they made no mention of disagreeing with the recommendation regarding Article 134.

50. The 1972 Annual Report of the United States Court of Military Appeals recommended that legislation be passed which would replace Article 134 by separate punitive articles. A similar recommendation was made by the Task Force on the Administration of Military Justice. Congress in the past has responded favorably to the military's request for specific new penal articles which the military thought it needed to reach specific acts. When the UCMJ was drafted "missing movement" and "misconduct as prisoner" were made the subject of specific punitive articles. See *Hearings Before Senate Armed Services Committee on S.857 and H.R.4080*, 81st Cong. 1st Sess. 37 (1949). More recently, the making or drawing of a check without sufficient funds was enacted as a specific punitive article, Article 123a, 10 U.S.C. Section 923a.

"well-settled customs and practices" of the military (Br. 27) and that there is a "common understanding and practice" (Br. 24) as to which acts fall within the Article's coverage. However, neither the government in its brief nor the Court of Military Appeals in upholding the validity of Article 134 in *United States v. Frantz*, *supra*, states what this common understanding and practice is or where it may be found.

To support its position, the government (Br. 15-17) cites *Dynes v. Hoover*, 20 How. (61 U.S.) 65 (1858) and other old Supreme Court cases which upheld the predecessor of Article 134 on the ground that "practical men in the navy and army" knew what crimes were covered by the article.[51] But it cannot be said that there exists today any body of "practical men in the navy and army," who know the reach of Article 134. When *Dynes* was decided the military was composed of a relatively small group of professional soldiers for whom the military was a lifetime career. Such was not the case in 1969 when the appellee was tried; for at that time there were over three million men and women in military service. Moreover, as Justice Clark pointed out below, "The General Article [has] expanded beyond recognition" since *Dynes* (J.S. App. A., 21).[52]

51. *Dynes* and the other cases were all decided well before the modern contours of the void for vagueness doctrine were enunciated by this Court in the 1920's in cases such as *United States v. Cohen Grocery Co.*, *supra*, and *Connally v. General Construction Co.*, *supra*, and in a period when this Court, as noted by Justice Clark, applied a hands-off policy towards courts-martial (J.S. App. A., 24).

52. Justice Clark stated:

> "Moreover, the old authorities cited bear little weight. Not only has the General Article been expanded beyond recognition, but the greater percentage of our armed forces are today non-career personnel. They are draftees or enlisted personnel with little military experience."

As we have noted above, *supra*, p. 24 every new edition of the Manual brings forth new miscellaneous offenses and the mysterious disappearance of others. Will it be argued that these additions and deletions are the result of "common understanding?" Furthermore, as we observed above, *supra*, p. 25 the offense of disloyal statements was only added to the Manual as a new element in 1951, *after* the enactment of the Uniform Code. Is it argued that a new "common understanding and practice" arose at that time? Can it seriously be contended that the serviceman charged with bestial acts with a chicken, *United States v. Sanchez*, *supra;* drinking with an enlisted man, *United States v. Livingston*, *supra;* fornication, *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956) and burning a building to defraud an insurance company, *United States v. Fuller*, 9 USCMA 145, 25 CMR 405 (1958), knew in advance that his acts would violate "military custom and practice?" The government admits (Br. 32) that "military custom and practice" is a fluid concept which is constantly changing. How is a serviceman to know when a particular act has solidified to the point of becoming part of military custom and practice? Even when an act has been listed in the Manual as falling within the ambit of Article 134, the highest military court has held that the act did not violate military custom. *United States v. Watuski*, 6 USCMA 724, 21 CMR 46, 53 (1956).[53]

Indeed even those charged with enforcing military laws disagree as to what constitutes a violation of military custom and practice. For example, in *United States v. Herndon*, 15 USCMA 510, 36 CMR 8 (1965), the court martial members held that obtaining telephone services with intent to defraud amounted to a violation of Article

53. The act in question was a passenger fleeing the scene of an accident. This was listed in the 1951 Manual, Appendix 6, Specification 142.

34. The Air Force Board of Review reversed. The Court f Military Appeals reversed the Board of Review holding hat such conduct did violate Article 134. The same attern occurred in *United States v. Sadinsky*, 14 USCMA 63, 34 CMR 343 (1964) (jumping off a ship). On the ther hand there have been cases in which the Court of Iilitary Appeals has held that an act did not violate rticle 134 even though the lower military court had held therwise. See, *e.g.*, *United States v. Downard*, 6 USCMA 38, 20 CMR 254 (1955) (negligent failure to maintain ufficient bank funds); *United States v. Gillin*, 8 USCMA 69, 25 CMR 173 (1958) (unlawful entry of a car); *United tates v. Sinigar*, 6 USCMA 330, 20 CMR 46 (1955) efusal to testify at a coroner's inquest). Even the various ervices disagree among themselves at times as to what acts olate Article 134. See *Joint Hearings*, *supra* at 365.[54]

It is abundantly clear that there is no "common nderstanding and practice" as to what acts fall within the cope of Article 134. The "well-settled custom and ractice" of Article 134 is that it serves as a catch-all to over any acts that a local commanding officer, in his bsolute discretion, feels violates the broad and generalized nguage of the article.

c. The Manual provides fair warning.

The government argues (Br. 30-32) that Article 134 is ot vague because the listing of specific offenses in the

54. The act in question amounted to frequent involvement with ivilian authorities in the nature of receiving numerous traffic iolations. The Judge Advocate General of the Navy stated that any years earlier he had charged a serviceman with violating Article 34 for this activity. General Hodson for the Army and Major eneral Manss for the Air Force stated that such activity did not mount to a violation of Article 134.

Manual, as a practical matter, gives "adequate notice" to servicemen. This argument has no merit.

In the first place the listing of specific offenses in the Manual does not create or define offenses but is only a "procedural guide." *United States v. Waluski*, 21 CMR at 46. The military courts have consistently held on the one hand, that the listing of an act in the Manual does not necessarily bring it within the coverage of Article 134, see, *e..g., United States v. Caune*, 22 USCMA 200, 46 CMR 200 (1973); *United States v. Gillin, supra; United States v. Waluski, supra; United States v. Hill*, ___ USCMA ___, CMR___, No. 27096 (Court of Military Appeals, Dec. 14, 1973) and on the other hand, that the omission of an act from the Manual's list does not exclude it from the coverage of the Article, see *supra* p. 23. As Justice Clark noted below, the cases "demonstrate it is neither necessary nor sufficient that a serviceman's conduct fit a Manual specification in order for him to incur criminal liability under Article 134" (J.S. App. A., 22-23).

In short what does or does not constitute a crime is only determined on an *ad hoc* basis *after* the event. Reference to the Manual's listing of specifications provides no guidance for, as the court below observed, "the Manual is but a mini-digest of the roving character of Article 134, whose vague and indefinite language is absolutely controlling." (J.S. App. A., 23).

Secondly, implicit in the government contention that the Manual provides fair warning is the premise that the President has the power to prescribe substantive offenses. The government takes no position as to whether the President has such power and states only that this question is "unsettled." But if his power is unsettled then obviously servicemen cannot and should not be

red to rely upon the Manual as a guide to what is or is prohibited. Moreover, it is plain that the question is "unsettled." The United States Court of Military als has flatly held that Congress did not and could mpower the President to define substantive offenses[55] as struck down substantive rules of law appearing in Manual. *United States v. Acosta-Vargas*, 13 USCMA 32 CMR 388 (1962); *United States v. Smith*, 13 MA 105, 32 CMR 105 (1962).

he government further suggests (Br. 30, fn. 14) ugh it does not argue, that the President as nander-in-Chief may have "inherent power to ulgate military law."[56] Yet the President's power as nander-in-Chief was not intended to include the

. In addition to the cases cited by the government (Br. 30, fn. r this proposition, see *United States v. Barnes*, 14 USCMA 4 CMR 347 (1964). In *Barnes*, the government conceded that esident lacked the power to create substantive offenses (Govt. Court of Military Appeals, 8-9), and the court agreed, stating Presidential authority in the premises is limited to the lgation of rules of procedure and modes of proof rather than passing matters of substantive law." 34 CMR at 349. In *Levy or*, 17 USCMA 135, 37 CMR 399, 403 (1967) the court ized Article 36 of the UCMJ, 10 U.S.C. Section 836 (pursuant ch the President derives his authority to issue the Manual) to ess' grant of authority "to the Supreme Court to prescribe f practice and procedure in Federal civilian cases." Article 56, S.C. Section 856, the other article cited by the government, ives the President power to establish limits of punishment for martial offenses and no one has heretofore seriously suggested gives the President power to create crimes.

. The government cites *Swaim v. United States*, 165 U.S. 553), for this proposition. Yet *Swaim* merely involved Presidential to convene a court-martial and not his power to create crimes. overnment also cites language from *Reid v. Covert*, 354 U.S. 1, 956). This language was followed by the Court's comment

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power to define crimes for the military, *The Federalist*, No. LXIX (Hamilton); Story, *Commentaries on the Constitution*, Vol. 2, p. 108 (4th ed. 1873); *United States v. McCormick*, 12 USCMA 26, 30 CMR 26, 28 (1960); *Ex Parte Milligan*, 71 U.S. (4 Wall) 2 (1866) for this power was explicitly granted by Article 1, Section 8, Clause 14 of the Constitution to Congress. [57]

Finally the government suggests that irrespective of Presidential power or the status of the Manual as substantive law its existence provides fair warning to servicemen of the coverage of Article 134. Aside from the fact that, as we have shown, this argument is not factually true, see *supra*, pp. 23-24 the logic of the government's position is that any commanding officer from the President down can define the contours of Article 134 by posting in an area to which servicemen have access a list of those offenses which the commanding officer feels are covered by Article 134. Such a procedure may be pragmatic for the military but there is no constitutional basis for claiming that an undefined and vague statute provides a license for enforcing authorities to determine its

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> "If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." 354 U.S. at 39.

57. This Court should not be blind to the reality that the listing of offenses in the Manual is not done by the President himself but by military officials.

coverage. Indeed leaving "basic policy matters" to enforcing authorities "for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application", *Grayned v. City of Rockland*, *supra* at 109, is one of the evils this Court has sought to avoid by requiring that penal statutes clearly set forth the conduct it proscribes.

This Court has uniformly held that if a statute is vague it cannot be saved by the practical device of allowing officials other than legislative bodies unfettered discretion to determine its scope. Nearly 100 years ago this Court stated in *United States v. Reese*, 92 U.S. 214, 221 (1876):

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large."

This same principle was reaffirmed nearly a century later in *Giaccio v. Pennsylvania*, *supra*, at 402-3, where this Court stated that a statute is not valid if it leaves "judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Accord*, *United States v. Five Gambling Devices*, 346 U.S. 441, 453 (1953) (Justices Black and Douglas concurring); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Musser v. Utah*, 333 U.S. 95, 97 (1948); *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964), *United States v. Robel*, *supra* at 275-276.

The government's citation (Br. 31) of *United States Civil Service Commission v. National Association of Letter Carriers*, *supra*, is not on point. In the first place the statute there involved was a regulatory, not a penal, statute. Moreover, the Court in that case did not sanction

any broad delegation of power to set basic legislative policy as the government would contend for here. The Court merely held that a particular phrase in the statute ("active part in political management") was not vague and "open-ended" since the phrase had been explicitly defined by Congress to mean the rules which had been developed by the Civil Service Commission prior to passage of the Act.[58] Furthermore this Court emphasized that it was sustaining the validity of the statute not because it granted broad power to the Civil Service Commission but rather because

> "It appears plainly enough that Congress intended to deprive the Civil Service Commission of rule making power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political management or political campaigns." *Id.* at 571.

The opinion of the Court indicates that both Congress and this Court considered that any grant of broad rule making authority to the Commission would have been invalid. *Id.* at 570.[59]

58. This Court noted that the Commission had "fleshed out" the meaning of the phrase to such an extent that a "clear and summary" statement of activities falling within the phrase had been prepared. 413 U.S. at 572. Such a statement could obviously not be drawn up with respect to Article 134.

59. The Court noted that the Act as originally drafted had conferred "broad rule making authority" on the Commission to spell out the meaning of the phrase in question and that Congress in discussing this particular section had expressed "strong objections" to this as "being an unwise and invalid delegation of legislative power to the Commission." *Id.* at 570. Consequently Congress itself wrote the definition of the phrase into the statute.

The government finally suggests (Br. 31) that this case, ike *Letter Carriers* is simply an example of "filling in the letails" of a legislative prohibition. We think it is preposterous to compare the Civil Service Commission's mplementation of the phrase "active part in political nanagement" with the conglomerate miscellaneous offenses in the Manual. Even more incredible is the government argument (Br. 32) that it is "immaterial that n the Hatch Act the statute specifically referred to the Commission's interpretations, whereas Article 134 is silent vith respect to the Manual." On the contrary, this Court n *Letter Carriers* expressly upheld the Act because the Commission's interpretations had been specifically adopted and approved by Congress. Indeed if the military vished to follow the example of the *Letter Carriers* case it vould submit for Congress' ratification and approval the ist of offenses in the Manual. But as a collorary to such ction the military would have to forego the authority it ow claims to add and delete, at random, from this list of offenses.

d. Article 134 is limited by the requirements that (i) "direct and palpable" injury be shown and (ii) convictions require a showing of *mens rea*.

(i). Initially, we note that the government's argument (Br. 27-28) that the reach of Article 134 is limited by a requirement that the offense in question cause "direct and palpable" injury totally ignores the second clause of Article 134. The government's quotations (Br. 28) from *United States v. Sadinsky*, *supra*, *United States v. Holiday*, 4 USCMA 454, 16 CMR 28 (1954) and the Manual, Par. 213b, involve discussions of the first clause of Article 134. The second clause of the Article ("all conduct of a nature to bring discredit upon the armed forces") by its very terms allows for conviction without any requirement of

"direct and palpable" and the Manual makes this clear when it states that this clause makes punishable conduct "which has a *tendency* to bring the service into disrepute." Manual, Par. 213c (emphasis added).[60]

Even if limited to the first clause, the government's argument is without merit. First nowhere are any standards set forth defining the meaning of "direct and palpable." The government does not offer any suggestion as to the meaning of these terms nor has the Court of Military Appeals ever done so. Second, the military itself has recognized that "it is not always easy to tell what acts fits in this category [of "direct and palpable"]"[61] *United States v. Davis*, 27 CMR 908, 909 (CGBR 1968) and at times the highest military court has held that certain acts were *per se* prejudicial to good order and discipline. *United States v. Snyder*, 1 USCMA 423, 4 CMR 15, 19 (1952), *United States v. Clark*, 22 CMR 888, 890 (AFBR 1956), *pet. den.*, 22 CMR 331 (1956).

More significantly, the Court of Military Appeals has recently held that the requirement of "direct and palpable" injury does not apply where the serviceman is charged with making disloyal statements. *United States v. Gray*, 20 USCMA 63, 42 CMR 255 (1970),[62] *United*

60. The government consistently and blithely ignores what we have noted before, namely, that the invalidity of either clause would void Avrech's conviction.

61. An examination of the cases shows that the term "direct and palpable" has no precise meaning and is not useful in resolving the vagueness of the Article. See, *e.g.*, *United States v. Clark*, 22 CMR 888 (AFBR 1956), *United States v. Wilson*, 13 USCMA 670, 33 CMR 202 (1963), *United States v. Mardis*, 6 USCMA 624, 20 CMR 340 (1956), *United States v. Walters*, 11 CMR 355 (ABR 1953), *aff'd in part on other grounds*, 4 USCMA 617, 16 CMR 191 (1954), *United States v. Hill*, *supra*.

62. The court stated that as long as the evidence did not "foreclose all possibility of successful promotion of disloyalty and

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States v. Priest, 21 USCMA 564, 45 CMR 338 (1972).[63] This elimination of the requirement of good order and discipline as applied to the offense of disloyal statements was noted by the court in *Stolte v. Laird*, 353 F. Supp. 1392, 1397 (D.C. D.C. 1972) which stated that the military had adopted a "*per se* approach justifying a finding of prejudice to good order upon a finding that a statement was disloyal."

Moreover, it is obvious that any fair application of this good order and discipline test would have required an acquittal here, for Avrech was convicted of an *attempt* to publish and it is plain that this attempt did not amount to a "direct and palpable" injury given the fact that his statement was not seen by anyone other than the person who brought his conduct to the attention of the authorities. Significantly, the government nowhere argues that Avrech's conduct here amounted to a "direct and palpable" prejudice to good order and discipline.

(ii). The government's related argument (Br. 33–34) that the requirement of *mens rea* limits the scope of Article 134 is likewise without merit. As the government concedes (Br. 33), no such requirement is contained in Article 134 and many of the specifications set out in the Manual do not require *mens rea*. The Court of Military Appeals stated in *United States v. Taylor*, 17 USCMA 595, 38 CMR 393, 395 (1968) that "Article 134, however, has an objective orientation in that it is calculated to preserve good order and discipline, without necessarily considering

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disaffection" it would support a finding of "reasonable direct prejudice to good order and discipline." 42 CMR at 260.

63. The court found the accused's conduct "sharply conflicts with conventional concepts of good order and discipline" and that the court members were justified in finding that "their [the statements] publication and distribution *tended* palpably and directly to *affect* military order and discipline." (Emphasis added.) 45 CMR at 338.

the particular mental attitude of the accused in committing a disruptive act." 38 CMR at 395.[64]

Moreover, as pointed out by the court in *Stolte v. Laird, supra*, in disloyalty cases the element of intent is not an independent element of the offense.

> "Most statements are intended to promote some thoughts on the part of the listener, and such design or intent is implicit in most forms of human communication. If the communication itself is deemed to be disloyal, it easily follows that it was intended to promote disloyal thoughts among the listeners. Thus the finding of the requisite intent can be, and has been [citing *United States v. Gray*] established simply by virtue of the fact that the statement found to be disloyal was communicated to other military personnel. The intent element of the specification is thus deprived of any independent vitality and made to turn upon the finding of whether the initial statement was disloyal." 393 F.Supp. at 1405.

Neither *United States v. Guest*, 383 U.S. 745 (1966) nor *Screws v. United States*, 325 U.S. 91 (1945) cited by the government (Br. 34) hold, as the government states, that a "scienter requirement can save a criminal statute from unconstitutional vagueness." They hold only that one who has specific intent can not complain that he was not given fair warning that the offense he committed was prohibited by the statute. However, as noted by this Court in *Grayned v. City of Rockford, supra*, the doctrine of vagueness does not rest solely on the need for a statute to give "fair warning."[65] Both *Guest* and *Screws* explicitly

64. The same principle (that *mens rea* was not a prerequisite to a conviction under Article 134) was applied in *United States v. Williams, supra*, where a serviceman was convicted under Article 134 of a lesser included offense precisely because he was too drunk to have the *mens rea* necessary to convict him of the original larceny charge under Article 121.

65. Throughout its brief the government consistently adopts the erroneous position that the *only* vice of a vague statute is a failure to give "fair warning."

recognize that although *scienter* may under certain circumstances eliminate the objection of lack of fair warning it cannot save a statute from the other defects of vagueness, *i.e.*, unlimited discretion to enforcing authorities and overbreath. For this reason, in both cases the Court sustained the statutes only because it was able to find that neither of these other values were violated by the statutes since the rights protected by the statutes had been "firmly and precisely established by a consistent line of decisions." *United States v. Guest*, 383 U.S. at 754; *Screws v. United States*, 325 U.S. at 104. That this was the limited holding in those cases was made clear by the statement in *Screws* that "willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements *which have been defined* certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment." *Id.* at 105. (Emphasis added.)

The present statute, unlike those in *Guest* and *Screws* has not been made specific and definite. It is difficult to conceive of a statute which is broader in scope and more susceptible of arbitrary enforcement than Article 134. It allows the exercise of rights to depend upon the "unfettered discretion" *Papachristou v. City of Jacksonville*, *supra* at 159, and "uncontrolled will of an official" *Staub v. City of Baxley*, *supra* at 322. No one can possibly define the meaning of the Article and the outer limits of its broad scope have yet to be reached.

POINT II

ARTICLE 134 OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONALLY OVERBROAD.

The government concedes (Br. 12, 18-19) that its contention that this Court should not consider the validity

of a statute on its face has no application to a statute whose prohibition "directly impinge upon or significantly implicate First Amendment rights." (Br. 12). The government also concedes that Article 134 does impinge upon First Amendment rights (Br. 23, 25). This Court has consistently held that a statute should be declared invalid on its face if within its reach "it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, *supra* at 114; *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1963), and where First Amendment rights are involved statutes are invalid unless they are drawn with "narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Judged by these standards Article 134 is clearly overbroad for, as our previous discussion has shown, this Article has no definite contours and can cover any conduct offensive to the military, including protected First Amendment activities.[66]

The government argues that the doctrine of overbreadth should not be applied to Article 134 because "in most of its applications Article 134 does not deal with speech-related activities but with conduct that implicates no First Amendment interests" (Govt. Br. 35). But the fact that Article 134 embraces within its scope every conceivable act that may conceivably affect good order and discipline or bring discredit upon the armed forces, including non First Amendment activities, does not diminish its chilling effect on the exercise of First Amendment rights. Accordingly its argument cannot be squared with the rationale underlying this Court's decisions holding statutes invalid for overbreath because of their impingement on First Amendment activities.

The government's claim that facial invalidity has been *principally* applied to statutes regulating "only spoken

66. For a discussion of the application of Article 134 to the First Amendment area, see Moyer, *Justice and The Military*, Section 4:145—Section 4:150 (1972).

words," recognizes that this doctrine has also been applied to statutes which regulate conduct as well. See, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Dombrowki v. Pfister*, *supra*; *Coates v. Cincinnati*, *supra*. Nor is there any merit to the government's further point that in considering the Article's overbreath one must be confined to the specifications in the Manual for as we have already shown, Article 134 is not so limited.

In effect, the government's argument concedes the following: (1) that Article 134 covers First Amendment activities; (2) that a statute which reaches First Amendment activities is over-broad; and (3) that the validity of such statutes are to be determined on their face. Thus, Article 134 must be declared invalid on the grounds of over-breadth. [67]

POINT III

THE WORD "DISLOYAL" USED IN THE COURT-MARTIAL CHARGE IS VAGUE AND OVERBROAD.

We have set out above, *supra*, pp. 10-11 the standards to be applied in determining whether words in a penal statute are vague and overbroad. In the instant case, Avrech was charged under Article 134 with making a "disloyal" statement with design to promote "disloyalty and disaffection." It is plain that tested by the relevant standards the word "disloyal" is both vague and overbroad. [68] As this Court stated in *Baggett v. Bullitt*,

67. As we show more fully in Point III, the government's contention that the particular specification of "disloyal statement" is not overbroad also has no validity.

68. Even if Article 134 can be saved from attack on vagueness and overbreadth grounds, the judgement below must be affirmed if the specification here fails to meet constitutional standards.

supra at 380, "measures which purport to define disloyalty must allow public servants to know what is and is not disloyal."

Disloyalty is not defined in either the Uniform Code of Military Justice or in any military regulations. Indeed, we know of no definition of this word in any United States statute. Congress never enacted the "uttering of disloyal statements" (Manual, Specification 147) as an offense and all that is known is that some anonymous military official added it as a "new entry" in the 1951 Manual for Courts-Martial, see *supra*, p. 25. Hence there is no evidence of any legislative intent that can serve to give meaning to this word.

One lower federal court which dealt with this precise issue held that the word "disloyal," as used in charges brought under Article 134, was unconstitutionally vague. In *Stolte v. Laird*, *supra*, the court overturned the disloyalty convictions of two servicemen who had distributed leaflets expressing their disapproval of the war in Vietnam. After reviewing this Court's standards of vagueness, the court held that:

> "[T]he word 'disloyal' is inherently ambiguous and ill-suited to prescriptive use, especially where First Amendment rights are involved. It is not a word of easily defined meaning and common understanding such that no further standard is necessary . . . .Just as 'conduct that annoys some people does not annoy others' [*Coates v. City of Cincinnati*, 402 U.S. 611] so also that which is disloyalty to some may seem to others the highest form of patriotism. . . .This Court is unable to perceive any 'ascertainable standard or guideline superimposed on the regulation in the context of the military environment' [*Schneider v. Laird*, 451 F.2d 345 (10th Cir. 1972, *cert. den.*, 407 U.S.

> 914] and has been offered no authorities, indeed nothing at all, from which even the outlines of such an 'ascertainable standard might be drawn.'" *Id.* at 1398-1399.[69]

Similarly in *Carlson v. Schlesinger*, 364 F.Supp. 626 (D.C. D.C. 1973), the court held that an Air Force regulation containing the words "loyalty, discipline [and] morale" was unconstitutionally vague since it provided no standards to guide commanding officers in deciding what publications came within its terms.

The government frankly concedes (Br. 36) that the term "disloyalty" only sets forth "general standards," arguing that no more can be done when dealing with so "subtle and sensitive" a subject.

We can well understand the government's difficulty in defining disloyalty for we venture to suggest that it is a vague concept which is not easily susceptible of definition. Various writers have recognized that the word is inherently vague and indefinite. See *e.g.*, Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L.J. 1, 38-53 (1948); Commager, *Freedom, Loyalty and Dissent*, Ch. 5 (1954); Bantecou, *The Federal Loyalty Security Program*, pp. 242-243 (1953); Gellhorn, *Security, Loyalty and Science*, p. 60 (1950).[70]

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69. The government never appealed this decision.

70. Occasionally writers have defined the word "disloyal" with precision, see, *e.g.*, Barth, *The Loyalty of Free Men*, p. 8 (1951) equating disloyalty with treason; Seth Richardson (then Chairman of the Loyalty Review Board) indicated that disloyalty meant advocating change in the form of government or the economic system of the United States by the use of unconstitutional means. *New York Times*, Dec. 28, 1947, p. 28, col. 6. But if the military limited itself to these precise definitions, thus eliminating the problem of vagueness, every previous prosecution for disloyalty,

The government further concedes that the application of admittedly general standards

> "to a particular statement necessarily must depend upon all the surrounding circumstances in which it was made: The precise words used, the innuendos they conveyed, the audience to which they were directed, their likely impact upon that audience, the military setting in which the statement was made, and its likely effect upon the troops" (Br. 36-37).

Obviously if the question of innocence or guilt can only be resolved after a consideration of this variety of vague factors then a serviceman certainly receives no fair warning in advance as to whether his statement constitutes disloyalty. Indeed it may well be said that under the government's approach the only standard by which it may be determined if an offense has been committed is whether or not the serviceman has been convicted or acquitted. This approach leaves the military tribunal free to make an *ad hoc* judgment in each particular case.

The government further suggests (Br. 37) that an understanding of the meaning of the term "disloyal statements" may be found in the Manual's discussion of that term. The government, however, acknowledges that the Manual makes no effort to define that term but simply lists "three representative examples . . . 'praising the enemy, attacking the war aims of the United States, or denouncing our form of government' " (Govt. Br. 37). But these examples are themselves so vague that they offer no guidance to servicemen as to what constitutes criminal activity. Moreover they are overbroad and take within their scope protected First Amendment activities.

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including the instant one, should have resulted in an acquittal. In addition, to avoid the vice of vagueness, it would be necessary to write these definitions into the UCMJ itself.

The example given by the Manual, "denouncing our orm of government" is vague and overbroad. It is similar o the oath struck down in *Baggett v. Bullitt, supra* at 371. Vould it be denouncing our "form of government" to rgue for the establishment of a unicameral legislature or o propose, as some have urged, that this Court should not ave the power to declare congressional statutes nconstitutional, or that the President should not possess he veto power. See *Schneiderman v. United States*, 320 J.S. 118, 143 (1943).

Equally vague is the Manual's example of "attacking he war aims of the United States." Application of this hrase to our recent conflict in Vietnam is impossible since he subject of our war aims in that conflict has been one of opeless confusion and continued debate since the onset f the war.

The above examples of the vagueness and possible verbroad reach of the phrases set forth in the Manual are ot just idle speculation. The vaguenesss of the pecification has allowed commanding officers to range idely over the field of speech and use the "disloyal" pecification to bring charges against servicemen whose iews are displeasing to them. For example, a serviceman as charged, *inter alia*, with disloyalty for carrying a sign eading "Let's have more than a choice between petty norant fascists in 1968" and "End Johnson's Fascist ggression in Viet Nam." *United States v. Howe*, 17 SCMA 165, 37 CMR 429 (1967). [71] Four other

71. The charge was dismissed during the court-martial since the aw officer held that the statements did not amount to disloyalty transcript of court-martial, 123-124). However, eventual dismissal f the charge does not obviate the fact that the serviceman's ommanding officer used the vague term "disloyalty" to bring harges in the first place.

servicemen were charged with promoting "disloyalty and disaffection" for having published a leaflet on base in the United States regarding a GI War Crimes Commission. *New York Times*, Jan. 25, 1970, p. 8, col. 1.

The Court of Military Appeals has recently had occasion to consider the meaning of "disloyalty." In *United States v. Harvey*, 19 USCMA 539, 42 CMR 141 (1970), the court stated that disloyalty amounted to a "disavowal of allegiance to the United States." 42 CMR at 544.[72] If the *Harvey* standard is applied to Avrech then Avrech should be acquitted because his statement did not indicate or even suggest a lack of allegiance to the United States. In any event the definition of disloyalty to mean "disavowal of allegiance" does not solve the vagueness problem for this Court held in *Baggett v. Bullitt*, *supra* at 371-372, that a similar phrase was unconstitutionally vague.

The government makes several additional arguments in an attempt to uphold the validity of the disloyalty specification. It claims that Avrech was clearly aware that his conduct amounted to a violation of Article 134. The government finds such awareness in that portion of Avrech's statement which acknowledged that the expression of his opinions might lead to a court-martial (Br. 25)[73] and from the fact that the provisions of the

72. Although the summary of the testimony at Avrech's court-martial does not indicate how the presiding officer defined "disloyalty" the then extant Military Judge's Guide, which the officer presumably followed, stated that it meant "not being faithful to an authority to whom respect, obedience or allegiance is due." Yet, such an instruction was held invalid in *United States v. Harvey*, *supra*. The Military Justice Guide was amended after the *Harvey* decision to read "not being faithful to the United States as a political entity."

73. "Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial."

UCMJ are explained to all servicemen, thus making it "not unlikely" that at some point the "specific applicability of Article 134" to Avrech's conduct was discussed (Br. 26).

The Court of Appeals below rejected the government's first contention, stating:

> "The fear, if any, which Avrech had that his action might lead to this court-martial does not demonstrate that he knew his actions were covered by Article 134. Nor does it provide a substitute for the Article's vague and indefinite language. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). There the Court found 'it irrelevant that petitioners at one point testified that they had intended to be arrested,' since 'the record is silent as to what petitioners intended to be arrested for....' Whether a statute affords 'fair warning . . . must be made on the basis of the statute itself and the other pertinent law, rather than on an ad hoc appraisal of the subjective expectations of particular defendants.' At 355-356, n. 5" (J.S. App. A., 23).

If anything, Avrech's apprehension that what he considered to be perfectly lawful activity (Tr.36a, 41a) might subject him to punishment evidences the overbreath of the Article and the disloyalty specification and their chilling effect on First Amendment rights.

The government's other contention with respect to Avrech's awareness, *i.e.*, that a provision in the UCMJ providing for instruction to servicemen justifies a finding that Avrech was told and knew that his conduct was covered by Article 134, is unrealistic since there is no basis for any inference that Avrech was ever instructed that his

conduct was so covered by Article 134,[74] if he was ever instructed at all.

The government argues (Br. 36) that the making of disloyal statements is a serious breach of discipline which must be punished.[75] We doubt that anyone has ever before suggested that a constitutional infirmity in a criminal statute may be ignored because an accused was guilty of a serious offense. If in fact a serious breach of discipline did occur, which we deny, this is no reason to validate an obviously invalid criminal statute such as Article 134. As the court below observed (J.S. App. A., 25, fn. 4) there are alternative statutes to cover such conduct.[76]

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74. Since the government admits that the Manual only sets out "general standards," and that disloyalty depends upon the circumstances in which a statement is made, no military official could possibly explain in advance to a serviceman what conduct is prohibited by Article 134.

75. The government points out (Br. 36) that the offense is punishable by imprisonment of up to three years, thus demonstrating its serious nature. It should be noted in contrast that the military did not take the same view of Avrech's conduct for he was only punished by loss of pay for three months and confinement for one month. The confinement portion of the sentence was suspended.

76. In addition to the statute cited by the Court below, the UCMJ itself has a wide range of statutes available to cover activities deemed to be unlawful. See, *e.g.*, Art. 82, 10 U.S.C. 882 (Soliciting desertion, mutiny, sedition or misbehavior before the enemy); Art. 89, 10 U.S.C. 889 (Disrespect toward superior commissioned officer); Art. 91, 10 U.S.C. 891 (Disrespect toward a warrant or non-commissioned officer in the execution of his office); Art. 101, 10 U.S.C. 901 (Betraying a countersign); Art. 104, 10 U.S.C. 904 (Communication or corresponding with the enemy); Art. 117, 10 U.S.C. 917 (Provoking speech or gestures).

The government's suggestion (Br. 37-38) that the ndard instructions given in a "disloyal statement" case ke clear that such a specification does not cover private versations but only statements made "in public" nich the instructions define as "openly, generally or oriously") does not help the government.[77] The cification here did not charge Avrech with "publicly" king the statement and under the definition given in the ndard instructions Avrech's statement did not amount "publicly uttering" since he intended his statement to used for private discussions with his friends.[78]

The government's final suggestion that the requirement "direct and palpable" prejudice limits the specification been answered elsewhere, *supra*, pp. 47-49.

Avrech's statement here was nothing more than a ement of disagreement with this country's policy ard Vietnam. The Court of Military Appeals in *United tes v. Harvey*, *supra*, stated that "[d]isagreement with, objection to, a policy of the Government is not essarily indicative of disloyalty to the United States." CMR at 146. Avrech's statement is milder in tone than statement of Pvt. Gray, which the Court of Military peals held not to be disloyal. *United States v. Gray*, ra (Charge IV, Specification 3).[79]

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77. We do not know what instructions were given in this case for summarized transcript of the trial does not include any ructions.

78. See, statement of facts, *supra*, p. 5. Moreover, Avrech ifically asked Corp. Jackson not to show the statement to one.

79. The government's contention (Br. 24) that Avrech was guilty disloyalty because his statement "at least implicitly urged nbers of the armed forces . . . not to participate in military vities in Vietnam" is not only an unfair inference from the

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Indeed, it can well be argued that appellee demonstrated loyalty, not disloyalty, in criticizing our course of action in Vietnam. As Henry Steele Commager, one of America's most eminent historians, has written:

> "True loyalty may require, in fact, what appears to the naive to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the 'Higher Law' were lacking in patriotism."[80]

Perhaps the classic definition of loyalty in the traditional American sense was stated by Mark Twain in *Connecticut Yankee in King Arthur's Court:*

> "You see my kind of loyalty was loyalty to one's country, not to its institutions or its office-holders. The country is the real thing, the substantial thing, the eternal thing; it is the thing to watch over, and care for, and be loyal to; institutions are extraneous. They are its mere clothing, and clothing can wear out, cease to protect the body from winter, disease and death . . . .
>
> The citizen who thinks he sees that the commonwealth's political clothes are worn out, and yet holds his peace and does not agitate for a new suit, is disloyal; he is a traitor. That he may be the only one who thinks he sees this decay does

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statement's content but, more importantly, even if true, this contention conflicts with the Military Judge's Guide, Department of the Army Pamphlet No. 27-9, Par. 4-139 (June 1, 1971) which states that urging others to disobey orders does not constitute disloyalty.

80. Commager, *Who Is Loyal To America?*, Harper's Magazine, September, 1947, 193, 196.

not excuse him; it is his duty to agitate anyway, and it is the duty of the others to vote him down if they do not see the matter as he does" (pp. 107-108).[81]

General Douglas MacArthur echoed the same ntiments when, following his removal by President uman, he stated:

> "I find in existence a new and heretofore unknown and dangerous concept that the members of our armed forces owe primary allegiance and loyalty to those who temporarily exercise the authority of the executive branch of government, rather than to the country and its Constitution which they are sworn to defend."[82]

In short, appellee's statement may to some in the litary signify disloyalty. To millions of other citizens it nifies loyalty, loyalty to the ideals upon which this untry was founded and which to them were abandoned this country's policy in Vietnam.

POINT IV

APPELLEE'S STATEMENT WAS PROTECTED BY IE FIRST AMENDMENT.

Assuming that this Court decides against us on the evious issues, it must reach the additional and

81. In the same vein, Senator Carl Schurz said nearly 100 years o, "Our country, right or wrong. When right, to be kept right. hen wrong, to be put right." (Quoted in Merle Curti, *The Roots of nerican Loyalty* (1946).) See also John Schaar, *Loyalty in nerica*, p. 60 (1957).

82. Address to the Massachusetts Legislature on July 25, 1951, oted in Sherman, *The Military Courts and Servicemen's First nendment Rights*, 22 Hastings L.J. 325, 346 (1971).

fundamental question of the right of a serviceman, following his induction into the Armed Forces, to continue to exercise his First Amendment freedom to speak and to express his views on matters of paramount governmental and national concern.[83] That this issue arises in the context of the war in Vietnam is not surprising for the myriad of newspaper and magazine articles, books and speeches about the war bear testimony to the fact that in the past several years it has dominated the national headlines as has no other event in recent memory. Students, workers and professionals have all publicly expressed their views on the war. Yet the action of the military here denies to an important segment of our citizenry — indeed to that segment most directly involved in the conflict — the right to comment and to express an opinion on this subject.

In a long line of cases this Court has made abundantly clear that speech may be curtailed and punished only under very narrow circumstances. It has held that a finding of unlawful speech may be established only by adherence to the most "rigorous standard of proof", *Noto v. United States*, 367 U.S. 290, 291, (1961) and that there is a fundamental "distinction between the statement of an idea which may prompt its listeners to take unlawful action, and advocacy that such action be taken." *Dennis v. United States*, 341 U.S. 494, 545 (1951), (Mr. Justice Frankfurter concurring). See *Yates v. United States*, 354 U.S. 298, 322 (1957). The application of these principles led this Court to hold in *Bond v. Floyd*, 385 U.S. 116 (1966), that an expression of support for men who were unwilling to submit to induction "cannot be interpreted as a call to unlawful refusal to be drafted." *Id.* at 133. This Court enunciated its most recent formulation of the test for

83. The court below did not reach this issue in view of its holding that Article 134 was unconstitutionally vague. The District Court did reach the issue, holding that the appellee's statement was not protected by the First Amendment.

determining First Amendment rights in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). There this Court struck down Ohio's criminal syndicalism statute holding that the First Amendment prohibited even sanctions against speech advocating violence, except "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The protections for speech which have been enunciated by the Supreme Court derive from the fundamental concept underlying the First Amendment, namely, that the soundest and most rational judgments will be arrived at through the free interchange of ideas, and that such interchange of ideas will enable all persons to effectively exercise their rights of self-government. See, *e.g.*, *Whitney v. California*, 274 U.S. 357 (1927); *Stromberg v. California*, *supra* at 369; *Thornhill v. Alabama*, *supra*; *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964).[84]

As we have noted above, *supra*, p. 33, both civilian and military courts have made clear that the precious freedoms guaranteed by the Bill of Rights are not to be denied to citizens solely by the virtue of their induction into the

84. This concept even predated the adoption of the Constitution. Thus George Washington in an address to the Officers of the Army stated:

> "If men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us; the freedom of speech may be taken away and dumb and silent we may be led like sheep to the slaughter." Address to the Officers of the Army, March 15, 1783, quoted in Comment, *The Serviceman's Right of Free Speech: An Analytical Approach*, 10 San Diego L.Rev. 143 (1972).

Armed Forces. The Armed Forces itself, with specific reference to freedom of speech, has recognized this principle. See Department of Defense Directive 1325.6 (Sept. 12, 1969) and Adjutant General's Memorandum "Guidance on Dissent," Dept. of the Army (May 28, 1969).

Tested by the *Brandenburg* standard, appellee's statement was clearly protected by the First Amendment. There was absolutely no evidence introduced at his court-martial that his statement was directed to inciting or producing violence. His statement did not mention, refer to or even suggest a call to illegal action. It was not intended to incite disobedience. It was not a direct personal insult to anyone, nor would any listener or reader be aroused to take unlawful action. *Cohen v. California*, 403 U.S. 15 (1971).[85]

Appellee's mild statement of opposition to governmental policy included quotations from a speech of President Nixon when he was Vice President and a statement by the Foreign Minister of Vietnam, both taken from a book entitled "Mission to Hanoi" which was readily available at the PX in Danang. There is absolutely no word in appellee's statement which has not been

85. Appellee's statement was apparently read by several servicemen, but the military at appellee's court-martial never attempted to show — indeed, it could not show — that the statement created disaffection or prompted disloyalty. Both Sgt. Moore and Corp. Slokus testified that the appellee's statement and his views on the war did not make any difference in how they carried out their military duties. (Tr. 48a, 51a). Corp. Jackson also testified that appellee "did not ask me to agree with what was on the paper. He did not say 'don't you think I am right.' He did not ask me to desert the Marine Corps. He did not ask me to join the V.C. He did not ask me to sit down on my job. He did not tell me I was foolish for being a good marine. He has never done so" (Tr. 28a).

repeated over and over again in books, periodicals and speeches and which might not have been said by any number of members of the United States Congress. It would be ignoring reality not to recognize that servicemen, including those stationed in Danang, were exposed to — indeed, themselves expressed — similar sentiments on numerous occasions.[86]

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It is conceivable, of course, that as a result of appellee's statement, other soldiers might have re-examined their own views and perhaps even changed their own opinions. This, however, is precisely what the First Amendment was designed to protect and encourage. *Roth v. United States, supra; New York Times v. Sullivan, supra.* There is no showing that such a re-examination of views would cause any soldier to disobey orders or interfere with a military function any more than would a Vietnam serviceman's ordinary reading of books, magazines and newspapers, all of which carry similar expressions of views.

There is no reason why a serviceman should not have been allowed to express, during off-duty hours, his personal opinion on the war or on any other subject of national concern. Other citizens have been allowed to comment on matters directly affecting them, see, *e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968); *James v. Board of Education*, 461 F.2d 566 *(2nd Cir. 1972), cert. den.*, 409 U.S. 1042; *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970); *Tepedino v. Dumpson*, 24 N.Y. 2d 705, 249 N.E.2d 751 (1969); *Brukiewa v. Police Commissioner*, 257 Md. 26, 263 A.2d 210 (1970), and have been allowed to express, in one manner or another,

86. The appellee and Sgt. Moore both testified that they discussed their opposing views on several occasions (Tr. 33a, 45a).

their opinion of the war. See *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Schacht v. United States*, 398 U.S. 58 (1970); *Cohen v. California*, *supra*. The same should be true here, especially since servicemen were more deeply and directly affected by the war than any other class of citizens.

To train soldiers to think independently and meet the needs of today's warfare has brought about a change in the military's training of servicemen, with greater emphasis being given to a serviceman's personal freedoms. One military commentator has noted that

> "[b]ecause our military philosophy has reached the point that the soldier is to be informed of not only what he is to do but also why, the next step of allowing the soldier to freely express his views follows naturally. It is a realization that the thousands of dollars spent to train a soldier in his specialty will pay more dividends if the soldier can speak up, thereby making the soldier happier and at the same time keeping his superiors better informed." Brown, *Must The Soldier Be A Silent Member Of Our Society*, 43 Mil. L. Rev. 71, 108 (1969).[87]

In addition, allowing servicemen to express their political opinions helps to insure that the military not become isolated from the rest of American society. Such expression of opinion enables the military force to keep abreast of values and ideas current in civilian society. Finally, no showing has ever been made that soldiers who possess or express policies contrary to national policies perform less efficiently than other soldiers. As one observer of the military has noted:

87. See Johnson, *Military Discipline and Political Expression: A New Look at an Old Bugbear*, 6 Harvard Civil Rts. Civil Lib. L. Rev. 525, 534-537 (1971).

"The experience of our para-military forces, such as police and fire departments, indicates that men can be permitted a wide latitude of freedom as to their personal, political, and social beliefs and yet still perform loyally on the job. That experience also shows that men can function efficiently and bravely in jobs involving a high degree of personal danger without being subjected to rigid conformity as to beliefs and attitudes." Sherman, *The Military Courts And Servicemen's First Amendment Rights*, 22 Hast. L.J. 325, 367 (1971).

To the extent that the government deals with this issue in their brief, their response is two-fold. First, that the rights of servicemen are more restricted than those of civilians (Br. 19) and second, that appellee's statement clearly affected "good order and discipline" (Br. 25).

We do not dispute the government's contention that servicemen's rights are more limited than those of civilians. However, in determining when a serviceman may exercise such rights, one must take into consideration the fact not only that he is a serviceman, but also the place and circumstances under which he attempts to exercise these rights. This is no more than a recognition that First Amendment rights are generally subject to reasonable regulation as to the time, place and manner of exercise, and not just in the military. See *Cox v. Louisiana*, 379 U.S. 536, 554-555 (1965). Recognition of this fact does not mean that one should abandon the application of the test enunciated in *Brandenberg v. Ohio*, *supra*, or that the test for determining when First Amendment rights may be denied is any different for servicemen than for other citizens. The test is the same; the only difference is that it must be applied under different circumstances.[88]

88. For example, it would be appropriate to consider whether or not the fact that Avrech made his statement in a combat zone was a circumstance that would contribute to producing "imminent,

(Cont'd)

The government's mere statement that "good order and discipline" will be affected by appellee's statement is insufficient to justify the curtailment of appellee's rights for such a claim amounts to nothing more than "undifferentiated fear or apprehension." *Tinker v. Des Moines School District*, *supra* at 508. The government has produced absolutely no evidence to demonstrate that discussion of the Vietnam war by servicemen during their off-duty hours will interfere with discipline or cause servicemen to refuse to perform their mission.

The government's argument amounts to a view that any expression of opinion critical of national policy must be suppressed. Yet this Court has explicitly held that First Amendment rights cannot be restricted solely because of the contents sought to be expressed. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), *Cohen v. California*, *supra* at 18; *Schacht v. United States*, *supra* at 63. Moreover, as the court so aptly observed in *Stolte v. Laird*, *supra* at 1403-1404, the military's concept that good order and discipline will be destroyed if servicemen hear opposing views of the war

> "would support restriction of *all* dissent on war aims, even by civilians and elected officials. Yet clearly the First Amendment forbids that. To justify restrictions on military personnel that do not apply to civilians, it would be necessary to show a peculiar harm to morale and discipline especially resulting from the fact that anti-war

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lawless action." As we have shown, in this particular case, Avrech's statement did not produce nor was it likely to produce such action. It should be noted in this connection that the Court of Military Appeals has frequently applied civilian standards of "probable cause" in invalidating searches in a combat zone. See *United States v. Atkins*, 22 USCMA 244, 46 CMR 244 (1973); *United States v. Troy*, 22 USCMA 195, 46 CMR 195 (1972); *United States v. Gibbons*, 21 USCMA 556, 45 CMR 330 (1972).

iews were expressed by a soldier rather than a ivilian . . . . Further, this approach presumes that ne mere hearing of anti-war sentiments will ndermine morale. It is a disservice to our military ersonnel to presume that they would be so easily wayed rather than allowing for the possibility that ney might readily reject the folly of the views xpressed and become strengthened in the view nat the military court is just . . . . Further, it must e remembered that any direct disobedience to rders, refusal of duty, or interference with ilitary operations can be properly punished under ther valid provisions of the UCMJ. It is for these easons that the Court finds it necessary to istinguish a possible effect on morale from a emonstrable effect on discipline."

government has presented no considerations which xempting the military from the application of the tandards of the First Amendment pronounced by rt. These standards are sufficiently flexible to the Court in any particular case to give tion to any valid military needs. As we have owever, no such valid military needs are present d, tested by this Court's First Amendment , Avrech's statement was fully protected by the endment.

CONCLUSION

The decision of the court below should be affirmed for the reasons set forth in that court's opinion.

Respectfully submitted

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Dated: January 30, 1974

APPENDIX A

Sample List of Acts With Which Servicemen Have Been Charged Since 1951 Under Article 134 Although Not Listed in the Manual As Within Article 134 At the Time They Were Committed.

ccepting money to remove Korean female from a tent, *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

ccepting money to transport female in government vehicle, *United States v. Alexander*, 3 USCMA 346, 12 CMR 102 (1953).

tering character and credit reference slip, *United States v. Wilson*, 13 USCMA 670, 33 CMR 202 (1963).

stial acts with a chicken, *United States v. Sanchez*, 11 USCMA 216, 29 CMR 32 (1960).

orrowing money from a trainee, *United States v. Calderon*, 24 CMR 338 (ABR 1957).

rning building with intent to defraud insurance company, *United States v. Fuller*, 9 USCMA 143, 25 CMR 405 (1958).

eating while calling bingo numbers, *United States v. Holt*, 7 USCMA 617, 23 CMR 81 (1957).

mmunicating defamatory statement about another person, *United States v. Brown*, 12 USCMA 368, 30 CMR 368 (1961).*

*Criminal libel was not set forth in the Manual's list of cifications until 1969.

Cruelty to member of one's own family, *United States v. Francis*, 12 CMR 695 (AFBR, 1953), *pet. den.*, 13 CMR 142 (1953).

Drinking alcoholic beverages in a public place, *United States v. Grose*, 26 CMR 740 (NBR 1958).

Endangering government property, *United States v. Martinson*, 21 USCMA 109, 44 CMR 163 (1971).

Exhibiting on shirt a representation of United States flag with a peace symbol, *United States v. Roberts*, No. 73 2070 (NCMR pending).**

Failing to remove female guest from military post, *United States v. Hibbard*, 12 CMR 492 (ABR 1953).

False statement on credit card application, *United States v. Rusterholz*, 39 CMR 903 (AFBR 1968).

Fornication, *United States v. Berry*, 6 USCMA 609, 20 CMR 325 (1956).

Fraternization with enlisted man, *United States v. Pitasi*, 20 USCMA 601, 44 CMR 31 (1971).

Jumping from a ship, *United States v. Sadinsky*, 14 USCMA 563, 34 CMR 343 (1964).

Keeping a disorderly house, *United States v. Mardis*, 6 USCMA 624, 20 CMR 340 (1956).

Laughing, talking and creating a disturbance while playing with the Marine Band on 19 May 1971, *United States v. House* (Naval District Washington).

**At the accused's court-martial for another offense, the accused's prior record showed that he had been convicted of violating Article 134 for this offense.

Littering the lawn of public quarters, *United States v. Ledbetter*, No. 73 1536 (NCMR, 27 Sept. 1973).

Negligent failure to maintain sufficient bank funds, *United States v. Downard*, 6 USCMA 538, 20 CMR 254 (1955).

Obtaining telephone services from telephone company with intent to defraud, *United States v. Herndon*, 14 USCMA 510, 36 CMR 8 (1965).

Occupying hotel room with female who was not his wife, *United States v. Walters*, 11 CMR 355 (ABR 1953).

Officer drinking with enlisted men, *United States v. Livingston*, 8 CMR 206 (ABR 1952), *pet. den.*, 8 CMR 178 (1953).

Officer found in "compromising situation" with wife of enlisted man, *United States v. Lee*, 4 CMR 185 (ABR 1951), *pet. den.*, 4 CMR 173 (1952).

Peering through window of family dwelling, *United States v. Hill*, 38 CMR 533 (ABR 1967).

Possession of alcoholic beverages in a public place, *United States v. Grose*, 26 CMR 740 (NBR 1958).

Refusing to testify at Coroner's Inquest, *United States v. Sinigar*, 6 USCMA 330, 20 CMR 46 (1955).

Sale of commissary goods at less than authorized price, *United States v. McLeod*, 18 CMR 814 (AFBR 1954).

Showing "stag" movies, *United States v. Cowan*, 12 CMR 374 (ABR 1953).

Sleeping in another man's bed with clothes on, *Unit*
States v. Landsperg, No. 73 0018 (NCMR 13 Fe
1973).***

Soliciting money from trainee, *United States v. Mayre*, 3
CMR 628 (ABR 1967).

Soliciting money to represent serviceman, *United States*
White, 7 CMR 764 (AFBR 1953).

Window peeping into trailer, *United States v. Clark*,
CMR 888 (AFBR 1956), *pet. den.*, 22 CMR 3
(1956).

***At the accused's court-martial for another offense,
accused's prior record showed that he had been convicted
violating Article 134 for this offense.